

EXXON CORP.

IBLA 85-372

Decided May 21, 1987

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, rejecting competitive oil and gas lease offer W-89298.

Reversed.

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

While the Secretary of the Interior has the discretionary authority to reject any or all bids as inadequate, once a decision has been made to accept a bid and this decision has been formally communicated by the authorized officer to the bidder, such discretionary authority has been exercised and the bid may not subsequently be rejected for an alleged inadequacy of the bonus bid.

2. Oil and Gas Leases: Competitive Leases -- Oil and Gas Leases: Stipulations

Where a Notice of Sale of competitive leases expressly notes that a particular parcel will be subject to special stipulations designed to protect big game winter range habitat and the precise nature of the restrictions would be made clear upon inquiry to the State Office as provided by 43 CFR 3120.4-1, an offeror will be deemed to have agreed to accept such stipulation even though it was not specifically described in the Notice of Sale.

APPEARANCES: C. M. Peterson, Esq., Denver, Colorado, for appellant; Lowell L. Madsen, Esq., Department Counsel, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Exxon Corporation has appealed from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated January 10, 1985, rejecting its high bid of \$ 514 per acre for Parcel 161 (400.35 acres) in the Church Buttes Known Geologic Structure. The land involved is described as lot 1, 97 IBLA 330

S 1/2 N 1/2, NE 1/4 SW 1/4, SE 1/4 sec. 5, T. 12 N., R. 114 W., sixth principal meridian, Uinta County, Wyoming. With its bid for Parcel 161 in the August 29, 1984, sale, appellant submitted a deposit of \$ 41,155.98.

By memorandum dated September 26, 1984, the Chiefs, Branches of Fluid Minerals and Appraisal jointly recommended to the State Director that a Notice of Probable Rejection (NOPR) be issued on Parcel 161, among others, and that high bids on several other parcels be accepted. This memorandum contains the signature of the State Director generally accepting the recommendations. A handwritten caveat provides, however, "Except as to rec[ommendation] on tracts No. 159 and 161. Please let me review all the detailed analysis on these tracts." On October 1, 1984, the valuation analyses were submitted for the State Director's review.

On October 26, 1984, the State Director decided to accept Exxon's high bid on Parcel 161, despite the recommendations of the Branches of Fluid Minerals and Appraisal. 1/ The Director's decision is accompanied by the following handwritten rationale: "Based on being lower than tract #160, part of [Parcel 161] outside estimated productive limits of Frontier and Dakota, depth of wells, small production from nearest well, and the serious bidder competition exhibited plus negative DCF [discounted cash flow] values." 2/

On November 2, 1984, BLM mailed the lease forms to Exxon for execution. BLM's standard form letter advised Exxon that it had "submitted the highest acceptable bonus bid." Exxon was requested to remit additional payments and to sign certain stipulations. Exxon was allowed 30 days to comply. Exxon was further admonished that failure to timely comply would

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1/ An Oct. 3, 1984, Post Sale Review memorandum by the Branch of Fluid Minerals states on Parcel 161:

"Review of geology indicates both the Frontier and Dakota Formations have potential for gas/oil production. Engineering valuation of Parcel 161 is based on economics of the Frontier Formation and gives no value to potential reserves of the Dakota because there is presently no Dakota production near the parcel.

"Industry is currently active in the areas and the post sale value for Parcel 160, which is adjacent to 161, for \$ 1039/acre indicates a more optimistic view than is being determined from available BLM geologic and engineering data. Possible optimism may be attributed to the potential of the Dakota with a bail-out zone in the Frontier, or the potential of deeper formations; all of which indicate, based on current activity, the pre-sale value of \$ 700/acre was realistic, and possibly low.

"Assuming the post sale value for Parcel 160 of \$ 1039/acre is reflecting the potential of deeper zones being realized from current drilling, it is recommended the high bid of \$ 514/acre be rejected and the State Office should issue a Notice of Probable Rejection for Parcel 161."

2/ The State Director also decided to overrule the Branch of Appraisal with respect to Parcel 159. It should be noted that the Branch of Fluid Minerals had reconsidered its earlier decision and supported acceptance of the high bid for Parcel 159.

result in forfeiture of its one-fifth bonus deposit. These documents were received by appellant on November 8, 1984.

On November 9, 1984, the State Director sent the following memorandum to the Division of Mineral Resources and Operations:

Subject: Additional Review of Parcel #161, Competitive Oil and Gas Lease Sale of October 29, 1984

Following discussion with your staff and the receipt of additional information, I am reversing my decision of 10/26/84 to accept the high bid on Parcel #161. Please proceed to issue a Notice of Probable Rejection (NOPR) to the high bidder on this tract.

In response to the State Director's November 9, 1984, memorandum, the Chief, Oil and Gas Section, issued the NOPR on November 14, 1984. It stated, in pertinent part:

[I]t has now been determined \* \* \* that your bid was lower than the presale estimate of value and is therefore, subject to rejection. You have the opportunity to provide this office with information substantiating your bid. The information you submit may include expert interpretations of engineering, geologic, or geophysical data on the parcel. It may also include recent, verifiable sales of leases similar to the parcel, including all terms of the sale affecting value. All information should demonstrate the prospective market value of the parcel. Raw, unevaluated data will not be reviewed. Upon receipt of your information, we will reevaluate the presale estimate of value and reconsider your bid.

Exxon was allowed 15 days within which to file additional information and did so on December 3, 1984. In its submission, Exxon argued that "the most advantageous situation for an economically developable hydrocarbon trap is a structural closure on the Dakota formation" and that, according to its seismic data, Parcel 161 was not on such a closure, whereas the adjacent tract, Parcel 160, which had received significantly higher bids, was on such a closure. Exxon contended that, based on the range of bids submitted on the two parcels, other bidders shared this viewpoint. Exxon further stated that unless a location could be obtained on the structured closure, the risks of not discovering economically recoverable hydrocarbons would increase considerably. Exxon emphasized that while both the Dakota and Frontier formations evidence oil and gas shows, "no commercially viable reservoir is present in the Frontier." Exxon also set out the profiles of four wells to substantiate its position that Parcel 160, which received higher bids, is a better development prospect than Parcel 161. Exxon pointed out that Anadarko, high bidder on Parcel 160, chose not to even bid on Parcel 161 and Exxon's own bid on Parcel 161 is 4-1/2 times higher than the average of the other bids (excluding three obviously low bidders). Exxon requested that BLM furnish it with the information that BLM relied on in its initial acceptance of Exxon's bid and also the information relied on which resulted in reversal of that decision. Finally, Exxon asked that it be afforded an opportunity to respond to such information prior to any additional action by BLM.

Apparently, on December 11, 1984, a BLM employee telephoned Exxon <sup>3/</sup> and informed it that, unless Exxon provided sufficient information to alter BLM's view, its bid would be rejected. In response thereto, Exxon submitted a letter dated December 19, 1984, in which it reiterated its request for the information on which BLM based its decision and also noted that, according to the December 11 telephone discussion, BLM had apparently failed to consider structural position in its evaluation. This letter noted that "as structural position is the single most important factor controlling economic hydrocarbon accumulation in this area, we do not understand how the BLM can make any valid analysis of lease value without considering it."

On December 20, 1984, the Deputy State Director, Mineral Resources and the Deputy State Director, Operations, sent a memorandum to the State Director recommending rejection of Exxon's bid. This memorandum argued, *inter alia*, that:

The pre-sale evaluation of \$ 700/acre for Parcel 161 was based on comparable sale analysis and was supported by strong market data. Although the DCF was negative and was based only on the economics of the Frontier Formation, the post-sale evaluation recognized the potential of the Dakota and deeper geologic units as the basis of current activity and as substantiation for bids over \$ 700/acre. Exxon's high bid of \$980/acre for Parcel 117 for the October 31, 1984 competitive sale, which consisted of two (2) tracts of 360 acres in Section 33 and 240 acres in Sections 29 and 30 and which is considered geologically similar to Parcel 161, confirms that the PEV of \$700/acre was realistic. The Branches of Fluid Minerals and Appraisal recommended rejection of Exxon's high bid of \$514/acre for Parcel 161.

On that same day, the State Director concurred in the recommendation for rejection. On January 10, 1985, the State Office issued a decision rejecting the high bid. Exxon duly filed a notice of appeal.

Exxon presents two major arguments on appeal. The first argument is that BLM's November 2, 1984, notice of acceptance of Exxon's bid resulted in a contract which the Department cannot subsequently repudiate. Citing general principles of contract law, Exxon argues that acceptance of an offer cannot be revoked after that acceptance has been communicated to the offeror. While Exxon concedes the general authority of the authorized officer to reject all bids, it contends that the authorized officer must exercise this authority prior to acceptance of a bid. Exxon argues that, having exercised his discretion to accept Exxon's bid, the authorized officer no longer had authority to subsequently reject it. Alternatively, Exxon contends that its bid for Parcel 161 represents fair market value. Because, as we shall explain, it is our view that the acceptance by the State Director, communicated to

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<sup>3/</sup> For some unexplained reason, there is no memorialization of this phone call in the record nor is there a copy of the Dec. 19, 1984, letter written by Exxon's Division Landman in response. This letter is set forth as Exhibit E to appellant's statement of reasons in support of its appeal.

Exxon, constituted the exercise of discretion vested in the authorized officer by 43 CFR 3120.5(a) and that his subsequent attempt to rescind this acceptance was ineffective, we do not reach the question whether Exxon has established that its bid constituted fair market value.

[1] Initially we note that there is no gainsaying the authority of the Secretary or his delegate to reject any or all bids tendered in a competitive lease sale. Indeed, the Board has so ruled on countless occasions. See, e.g., Harris-Headrick, 95 IBLA 124 (1987); Viking Resources Corp., 80 IBLA 245 (1984); Exxon Co. U.S.A., 15 IBLA 345 (1974). The question which this case presents, however, involves the point in time that this discretion is exercised.

In Superior Oil Co. v. Udall, 409 F.2d 1115 (D.C. Cir. 1969), the United States appealed from a decision of the District Court for the District of Columbia which had rejected a decision of the Secretary of the Interior accepting an unsigned high bid for a tract of land on the Outer Continental Shelf (OCS), submitted by Union Oil Company (Union). The district court had also directed the issuance of the OCS oil and gas lease to Superior Oil Company (Superior), which had submitted the second highest bid. In its decision, the court of appeals first affirmed the district court's ruling that an unsigned high bid was fatally defective and not subject to subsequent ratification. It then turned to the question whether the district court properly ordered issuance of the lease to Superior.

The Department argued, in essence, that, since it still retained authority to reject any or all bids, it would, if rejection of Union's bid were required, reject all other bids and re-post the tract for further competitive bidding. Thus, the Department contended, the district court's order to issue the lease to Superior was improper.

In rejecting these arguments, the court of appeals noted:

The use of the word "authorized" indicates that the Secretary has discretion in granting leases and is not required to do so. He might for example have rejected all bids on the ground that none was in the public interest, but if this had been indicated it was a decision which he was obliged to make at the time, not as an afterthought \* \* \*. It seems clear on this record that had Union submitted no bid at all, Superior would have been awarded this lease as the highest responsible qualified bidder since it is implicit in the retention of both Union's and Superior's checks and returning all others, that the Secretary determined that both Union and Superior were responsible qualified bidders. [Emphasis supplied; footnote omitted.]

Id. at 1121. In effect, the court held that, having once determined that the bid was acceptable, the Secretary was estopped from changing his mind and ordering its rejection. We hold, in accordance with this division, that once the authorized officer has communicated acceptance of a high bid he is thereafter estopped from rejecting the bid because of a perceived inadequacy in the amount tendered.

This holding is in accord with prior Departmental interpretations. Thus, in Exxon Co. U.S.A., supra, after discussing the import of Superior Oil Co. v. Udall, supra, we noted, "The procedures followed in the cases at bar comport to the Superior Oil Company declaration that the bid officer has a right to reject all bids if he does so immediately. That is what was done here." Id. at 350-51. In this appeal, in contradistinction, rather than exercise the reserved authority to reject any or all bids, the State Director affirmatively accepted appellant's bid. By doing so, contractual obligations arose binding both appellant and the Department. <sup>4/</sup>

Thus, appellant was obligated to tender the balance of the bonus bid together with the first year's rental and return the signed offers to lease in 30 days. See 43 CFR 3120.5(b). If appellant failed to comply, the regulations provide for the forfeiture of the one-fifth bid deposit. See 43 CFR 3120.6. This forfeiture constitutes "liquidated damages" assessed against a high bidder for failure to fulfill its contractual obligations. See Midwest Oil Corp., IA-615 (Supp.) (Apr. 1, 1968). The Government, on the other hand, by accepting the high bid bound itself to issuance of the lease upon submission by the high bidder of the necessary documents and balance of the bonus. Indeed, without this mutuality of consideration, there would be no basis upon which to enforce the forfeiture of the bid deposit. Thus, once the Government notifies a high bidder that the bid is acceptable, the Government has contractually obligated itself to issue the lease upon fulfillment of the conditions specified in 43 CFR 3120.5(b). See Allen v. United States, C 74-331 (D. Utah Apr. 20, 1976) (actions taken by an employee "within the course and scope of his authority \* \* \* are binding upon his principal, the defendant Secretary of [the] Interior").

We recognize that situations could occur in which the Department found it impossible to issue a lease after accepting a high bid. Thus, if it were subsequently discovered that the Government owned no mineral interest in the lands involved or that an outstanding oil and gas lease existed covering

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<sup>4/</sup> The decision in Willcoxson v. United States, 313 F.2d 884 (D.C. Cir. 1963) is clearly distinguishable. That case involved the rejection of an application under the Isolated Tracts Act, 43 U.S.C. § 1171 (1970) (repealed by section 703(a) of the Federal Land Policy and Management Act of 1976). While appellant therein had originally been declared the "purchaser" of two tracts, no cash certificate had issued. The applicable regulation, 43 CFR 250.5 (1954) expressly provided that "until issuance of a cash certificate, the authorized officer may at any time determine that the lands should not be sold [and] the applicant or any bidder has no contractual or other rights as against the United States." It was in reliance on this provision that the court of appeals affirmed the ultimate rejection of the application. See also Ferry v. Udall, 336 F.2d 706 (9th Cir. 1964). No similar provision purporting to fix the date that contractual obligations arise exists with reference to high bid rejection. Indeed, as the text of this decision subsequently makes clear, the thrust of 43 CFR 3120.6 is such that it presupposes contractual obligations prior to the actual issuance of the lease.

those lands, the Department, perforce, could not issue a lease. But that is a situation in which a clear mutual mistake of fact (viz. that the Government owned what it was selling) served to discharge contractual obligations on both sides. No such mutual mistake is shown herein. 5/

[2] Counsel for BLM does not dispute the above analysis. Rather, counsel focuses on a stipulation submitted to appellant which, BLM argues, was not referenced in the Notice of Sale. The effect of this omission, BLM further contends, was to make BLM's notification to Exxon not an acceptance of its high bid but rather a counteroffer. BLM cites Texaco U.S.A., 82 IBLA 61 (1984), in support of its argument. BLM notes that it transmitted its rejection to appellant before Exxon accepted this counteroffer. Accordingly, BLM argues that no contractual obligations ever arose with reference to the instant case.

In response, appellant argues that all bidders had adequate notice of the stipulation and that, if a bidder desired precise knowledge of the wording of the stipulation, inquiry could have been made at the State Office, as provided by 43 CFR 3120.4-1. Appellant contends that the acceptance letter sent by BLM did not contain any additional stipulations not reflected in the Notice of Sale sufficient to convert the acceptance into a counteroffer.

The case file discloses that on January 26, 1984, the Forest Service, Department of Agriculture, recommended that the lands within Parcel No. 161, among others, be leased subject to certain standard stipulations. In addition, the Forest Service recommended the following:

Stipulation for the protection of seasonal wildlife habitat, activities will be allowed from June 1 to November 1; Stipulation to maintain esthetic values; Controlled or Limited Surface Use Stipulation

Reason: big game winter range and riparian vegetation

Duration: yearround

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5/ A similar approach has been mandated for timber sales. Thus, under the decision in Elaine Mikels, 41 IBLA 305 (1979), high bids are announced prior to adjudication of pending protests to a timber sale, but ultimate acceptance of the bid is expressly made contingent upon adjudication of the protest. If a protestant is able to establish that the timber sale should not proceed, the effect of this is to establish the existence of a mutual mistake of fact vis-a-vis the Government and the timber purchaser; namely, the land was not properly subject to a timber sale. The Government does not, however, retain authority during the period of protest adjudication to declare the high bid unacceptable. See, e.g., In re Lick Gulch Timber Sale, 72 IBLA 261, 316-17, 90 I.D. 189, 220 (1983).

Another document in the file, apparently prepared by BLM, 6/ indicates that Parcel Nos. 160 and 161 would be subject to "Stip #7 Big Game Winter Range In Wasatch N.F." A further notation occurs "OK 4/1 to 12/15." 7/

The Notice of Sale provided, as with respect to Parcel Nos. 160 and 161, as follows: "Forest Service Stipulation Form 3109-3, and Supplement, and Controlled or Limited Use: Reason: Big game winter range & riparian vegetation year-round."

Counsel for BLM points out that the controlled or limited surface use stipulation is a Forest Service stipulation whereas the stipulation sent to appellant in addition to the controlled or limited surface use stipulation (apparently known as Stipulation #7) is a BLM stipulation. 8/ However, as counsel for appellant points out, the controlled or limited surface use stipulation is much more restrictive than Stipulation #7. Stipulation #7 provides as follows:

In order to protect big game winter range habitat exploration, drilling, and other development activity will be allowed only during the period from 4/1 to 12/15. This limitation does not apply to maintenance and operation of producing wells. Exceptions to this limitation in any year may be specifically authorized in writing by the District Manager, Bureau of Land Management.

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6/ Appellant suggests that this document was part of the Jan. 26, 1984, letter from the Forest Service. While it does appear in the case file immediately below the letter, it is unlikely that it is a continuation of that letter. Thus, the letter begins, "We have no objection to the issuance of oil and gas leases for the lands described below which are within the Wasatch National Forest." While Parcel Nos. 160 and 161 are within the Wasatch, a number of the other parcels listed on the next page are not within any forest area and therefore the recommendations of the Forest Service would not have been sought. Given other notations on this page, it seems reasonably clear that this document was generated by BLM after it had received the January 26, 1984, letter.

Actually, at the time this document was prepared the two parcels were numbered as 169 and 170. It seems obvious that a number of other parcels, which were originally intended to be included in the sale, were dropped before the Notice of Sale was issued.

7/ Unlike the situation which obtains in the leasing of acquired lands where the consent of the Forest Service is a precondition of leasing, where public domain lands are involved BLM must exercise final authority in determining which stipulations to apply to a lease. Compare Amoco Production Co., 69 IBLA 279 (1982) with Natural Gas Corporation of California, 59 IBLA 348 (1981).

8/ This fact, however, seems to contradict any earlier assertion by BLM that the stipulation had been included among those sent to appellant "in a good-faith effort to comply with the wishes of the Forest Service." There is no evidence that the Forest Service was desirous of a stipulation which would make surface entry in the land during certain times of the year subject to

This should be contrasted with the more stringent limitations found in the controlled or limited surface use stipulation. That stipulation provides:

This stipulation may be modified when specifically approved in writing by the District Engineer, Minerals Management Service, with concurrence of the Federal surface management agency. Distances and/or time periods may be made less restrictive depending on the actual onground conditions.

The lessee/operator is given notice that all or portions of the lease area may contain special values, may be needed for special purposes, or may require special attention to prevent damage to surface and/or other resources. Any surface use or occupancy within such special areas will be strictly controlled. Use or occupancy will be authorized only when the lessee/operator demonstrates that the special area is essential for operations in accordance with a surface use and operations plan which is satisfactory to the Minerals Management Service and the Federal surface management agency for the protection of such special areas and existing or planned uses. Appropriate modifications to imposed restrictions will be made for the maintenance and operation of producing oil and gas wells; however, in extremely critical situations, occupancy may be allowed.

After the Federal surface management agency has been advised of specific proposed surface use of [sic] occupancy of these lands, and on request of the lessee/operator, the agency will furnish specific locations and additional information on such special areas.

Description: Entire Lease

Reason for Restriction: Big game winter range and riparian vegetation

Duration of Restriction: Yearround

In contrast with Stipulation #7 which allows exploration, drilling, and other development activity between April 1 and December 15 without the prior approval of BLM, the controlled or limited surface use stipulation prohibits any surface use or occupancy at any time of the year without the prior approval of both MMS and the Forest Service. Moreover, surface use

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fn. 8 (continued)

the approval of the BLM District Manager, particularly inasmuch as the controlled or limited use stipulation made surface occupancy at any time of the year subject to the prior approval of the Forest Service and the District Engineer, Minerals Management Service, and then, only "in extremely critical situations."

will be authorized only upon a showing that the land "is essential for operations." Faced with such a broad-based restriction of use, a restriction which both BLM and appellant agree was referenced in the Notice of Sale, we find it difficult to ascertain how the addition of the substantially less onerous provisions of Stipulation #7 constitutes an additional condition sufficient to make its imposition an effective counteroffer which appellant was at liberty to reject without fear of forfeiting its one-fifth bid deposit.

In any event, appellant is correct that had inquiry been made of the State Office as to the exact terms and conditions of the stipulation occasioned by concern for the fact that the offered lands were big game winter habitat, as a prospective bidder is so advised by 43 CFR 3120.4-1, the applicability of Stipulation #7 to the lease would have been readily apparent. Given the facts of this case, we would not permit Exxon to withdraw its high bid without penalty based on an assertion that Stipulation #7 was a counteroffer. Neither can we hold that its insertion vitiated the authorized officer's acceptance of Exxon's bid. Accordingly, we hold that, having accepted the high bid tendered by Exxon in the instant case, the authorized officer no longer had authority to reject it for a perceived inadequacy in amount.

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 Wyoming State Office, Bureau of Land Management, rejecting Exxon's high bid is reversed.

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James L. BURSKI  
Administrative Judge

We concur:

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Bruce R. Harris  
Administrative Judge

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C. Randall Grant, Jr.  
Administrative Judge.