



CHAINMAN OIL & GAS, LLC

182 IBLA 355

Decided August 28, 2012



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

CHAINMAN OIL & GAS, LLC

IBLA 2012-146

Decided August 28, 2012

Appeal from a decision of the Nevada State Office, Bureau of Land Management, rejecting noncompetitive oil and gas lease offers. NVN 090572.

Affirmed.

1. Oil and Gas Leases: Noncompetitive Leases

A noncompetitive oil and gas lease offer must include payment of the first year's rental and the applicable processing fee. If a person submits multiple offers, one of which is selected by BLM as first in priority to receive the lease but is later found to be deficient in the required payment, that deficiency cannot be corrected by applying the payments for the offers that were not selected to the deficient selected offer, because each offer competes independently against each other offer.

2. Oil and Gas Leases: Noncompetitive Leases

A first day-after offer for a noncompetitive lease that includes a more than nominally deficient first year rental payment that is corrected on the same day will retain its first day-after priority. However, in the absence of evidence in the record of such a correction, a BLM decision rejecting the deficient offer will be affirmed.

3. Oil and Gas Leases: Noncompetitive Leases

Submission of a noncompetitive oil and gas lease offer does not create a right to lease issuance enforceable by the offeror against BLM, and so BLM's delay in recognizing a lease offer as deficient is not a ground for concluding that a decision rejecting the offer is in error.

APPEARANCES: Stewart Graham, Valley Cottage, New York, and Paul Noble, Bedfordshire, England, UK, for appellant.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HOLT

Chainman Oil & Gas, LLC (Chainman) has appealed from a February 23, 2012, decision of the Nevada State Office, Bureau of Land Management (BLM), rejecting two noncompetitive oil and gas lease offers, NVN 090572 (Parcel 67) and NVN 090574 (Parcel 70). Chainman's appeal is limited to the rejection of the offer for Parcel 67.

BLM's decision is affirmed, for the reasons set forth below.

Background

The Mineral Leasing Act (MLA) provides that if lands are not leased competitively, BLM may issue a noncompetitive oil and gas lease to "the person first making application for the lease who is qualified to hold a lease" upon payment of a required application fee. 30 U.S.C. § 226(c)(1) (2006). So, after BLM has offered to lease parcels for oil and gas development at a competitive lease sale pursuant to 43 C.F.R. Subpart 3120, BLM may offer for noncompetitive lease those parcels of land that received no competitive bids. 43 C.F.R. § 3110.1(b). Those parcels become available for noncompetitive lease as early as the first business day after the end of the competitive lease process, and remain available for up to two years. *Id.* Noncompetitive offers "shall receive priority as of the date and time of filing . . . except that all noncompetitive offers shall be considered simultaneously filed if received in the proper BLM office any time during the first business day following the last day of the competitive oral auction." 43 C.F.R. § 3110.2(a). In the event that more than one such "first day-after offer" is filed, 43 C.F.R. § 1822.18 requires BLM to determine the order in which to accept those simultaneously filed documents by a drawing open to the public.¹ However, a first-drawn offer may not be given priority

¹ BLM's decision references the wrong authority when it states that "[p]ursuant to 43 CFR § 3110.2(b), when multiple first day-after offers are filed for the same parcel, a drawing is held to select a single priority lease offer." Decision at 2. The regulation at § 3110.2(b) applies only to applications filed under former subpart 3112 which addressed simultaneous filings submitted prior to the passage of the Federal Onshore Oil and Gas Leasing Reform Act of 1987, Pub. L. No. 100-203, and is inapplicable to the offer involved in this appeal. See 53 Fed. Reg. 22814, 22824-25 (June 17, 1988). The applicable regulation, at 43 C.F.R. § 3110.2(a), refers to § 1821.2-3(a), a regulatory reference that no longer exists. In 1999, that regulation was recodified as
(continued...)

if the offer is not complete. As one court observed: “Giving an unqualified first-drawn entrant additional time to file does infringe on the rights of the second-drawn qualified offer.” *Ballard E. Spencer Trust, Inc. v. Morton*, 544 F.2d 1067, 1070 (10th Cir. 1976).

In order for an offer to be accepted, it must, among other things, include “payment of the first year’s rental and the processing fee for noncompetitive lease applications.” 43 C.F.R. § 3110.4(a). The rental payment is based on the acreage of the lands for lease, if known, and the applicable annual rental rate currently is \$1.50 per acre for each of the first five years of the lease. *Id.* §§ 3103.2-1(a), 3103.2-2(a). The current processing fee is \$380. *Id.* § 3000.12 (FY 2012 Processing and Filing Fee Table). “An offer deficient in [the amount of] the first year’s rental by not more than 10 percent or \$200, whichever is less, shall be accepted by the authorized officer provided all other requirements are met.” *Id.* § 3103.2-1(a). An offer that fails to meet this or any other regulatory requirement “shall be rejected. *Id.* § 3110.7(d).

In this case, BLM held a competitive oil and gas lease sale on December 13, 2011, and Parcel 67 received no bids. The next day, Chainman provided three identical noncompetitive offers for Parcel 67. The offer forms identified the land as all of secs. 21, 22, and 23, and most of sec. 24 (“N2NE, SWNE, NW, N2SW, SWSW, N2SE, SESE”), T. 7 N., R. 50 E., Mount Diablo Meridian, Nye County, Nevada, consisting of a total of 2,440 acres. On each offer form, Chainman authorized credit card charges of \$380 for the processing fee and \$3,360 for the first year’s rental payment. Besides Chainman’s three offers, the only other first day-after offer for Parcel 67 was submitted by Major Oil, which submitted a check for a total charge of \$4,040, including \$380 for the processing fee and \$3,660 for the first year’s rental payment.²

Because there were multiple first day-after offers submitted for parcel 67, all considered simultaneously filed, BLM held a drawing to determine which offer would have the priority for being awarded a lease. *See* 43 C.F.R. § 1822.18. One of Chainman’s offers was selected, and BLM subsequently processed charges of \$380 for each of Chainman’s three offers (a total of \$1,140) and Major Oil’s one offer (\$380),

¹ (...continued)

§ 1822.17 and § 1822.18. *See* 64 Fed. Reg. 53213, 53216-17 (Oct. 1, 1999). That rulemaking failed to update the cross-reference. The regulation at § 1822.18 states that in determining in which order to accept simultaneously filed documents, “BLM makes this decision by a drawing open to the public.”

² Acceptable forms of payment to BLM include United States currency, checks, money orders, bank drafts, and credit card charges, unless pertinent regulations specify otherwise. 43 C.F.R. § 1823.10.

for the nonrefundable processing fees. BLM also processed a charge of \$3,360 for the first year rental payment for Chainman's selected offer. BLM then returned the \$3,660 rental check that Major Oil submitted with its offer. Justin Abernathy, BLM, Conversation Record (Feb. 6, 2012) (Major-Abernathy Record).

BLM later realized that the \$3,360 rental payment authorized by Chainman was deficient by \$300, because the required rental payment for a 2,440 acre parcel was \$3,660. *See* 43 C.F.R. § 3000.12 (FY 2012 Processing and Filing Fee Table). That deficiency was greater than the "not more than 10 percent or \$200, whichever is less" requirement for offers that could be accepted by BLM. BLM determined that all three Chainman offers contained the same unacceptable deficiency in rental payment while Major Oil's offer was acceptable. BLM subsequently contacted Major Oil to indicate that it had the lone qualifying first day-after offer and to request that it resubmit its returned check. Major-Abernathy Record.

Based on its finding of Chainman's offers' deficiency, BLM issued the decision under appeal rejecting these offers. Chainman timely appealed.

Argument and Analysis

[1] First, Chainman points out that its three offers, in aggregate, authorized \$1,140 for three filing fees. Mar. 19, 2012, Statement of Reasons (March 19 SOR) at unp. 1. Therefore, Chainman asserts that BLM should have augmented the deficient first year rental on the successful offer with authorized charges from a rejected offer. *Id.* This argument ignores the fact that the \$380 processing fee for each offer is a nonrefundable fixed fee incurred upon submitting each offer and it bears no relationship to the proffered rental payment. 43 C.F.R. § 3000.12(a). The \$380 processing fee for an unsuccessful offer cannot "cover" a deficiency in another offer, because the fee covers the cost of processing an additional offer in the drawing for priority.

Chainman's argument also fails because even though several offers may be submitted by the same person, each offer competes independently against the other offers in the drawing. It would be unreasonable to allow a person to submit multiple deficient offers, increasing the chance of selection, and then to allow authorized charges from the unsuccessful deficient offers to "make up" the deficiency in the selected deficient offer. Instead, each offer is independently evaluated for compliance with the applicable regulations.

BLM regulations require that a noncompetitive oil and gas lease offer include full payment of the first year's rental. 43 C.F.R. §§ 3103.2-1(a); 3110.4(a). If the rental submitted with an offer is more than nominally deficient, *see* 43 C.F.R.

§ 3102-2-1(a), the offer is considered incomplete and is properly rejected. *Kay Papulak*, 132 IBLA 117, 118 (1995); *Stephen S. Lange*, 119 IBLA 45, 46 (1991). In *Lange*, BLM rejected a first-drawn simultaneous noncompetitive lease offer because the rental was more than nominally deficient. Like Chainman in the instant appeal, *Lange* similarly argued that BLM should have taken into consideration the total amount submitted with other unsuccessful offers. We rejected this argument, stating: “Orderly administration of the oil and gas leasing program . . . necessarily precludes BLM from transferring, without prior written instruction, money paid for one purpose to another, e.g., rental money tendered for one offer to another.” *Id.* at 47. We “conclude[d] that the failure to tender sufficient rental for an offer cannot be cured by recourse to other funds available in the absence of valid written instructions after the drawing at which priority of offers was determined.” *Id.*

In this case, Chainman’s successful offer was deficient by \$300. BLM will accept an offer that is only nominally deficient, that is “deficient in the first year’s rental by not more than 10 percent or \$200, *whichever is less.*” 43 C.F.R. § 3103.2-1(a) (emphasis added). For Parcel 67, 10 percent of the first year’s rental would be \$366. Because \$200 is less than \$366, under the regulation, Chainman’s offer would be nominally deficient only if it were deficient by not more than \$200. As it was deficient by \$300, it was more than nominally deficient.

Chainman alternatively asserts that it and BLM jointly acknowledged that its offers contained deficient rental payments when they were submitted, but that BLM employees assured Chainman that the \$300 deficiency would be corrected and charged to Chainman’s credit card. Mar. 28, 2012, Statement of Reasons (March 28 SOR) at unp. 1. Chainman then states that BLM charged the \$300, but then that transaction “subsequently [was] voided [by BLM] supposedly by mistake.” *Id.* Chainman later submitted a copy of an e-mail purportedly in support of this assertion, sent to Chainman from a BLM employee on December 21, 2011, stating that another BLM employee had told her that he had “accidentally charge[d] your credit card for an extra day after the sale offer, but that” the charge was voided.³ May 1, 2012, Statement of Reasons (May 1 SOR) at unp. 1 and attached e-mail.

The record shows that Chainman made similar assertions to BLM staff during telephone conversations prior to issuance of the decision. Justin Abernathy, BLM, Undated Conversation Record (referring to telephone conversations between Feb. 21-23, 2012) (Chainman-Abernathy Record). During those conversations, BLM requested additional information from Chainman, including the identity of the BLM

³ It is unclear what “accidentally charge[d] your credit card for an extra day after the sale offer” means or to what it refers. This vagueness limits the probative value of the e-mail.

employee who assisted Chainman with its submission, documentation that Chainman's credit card was charged for the \$300 deficiency, and any evidence that on December 14 a Chainman employee actually instructed BLM staff to charge the \$300 deficiency. Chainman-Abernathy Record at unp. 2. Chainman responded that it would investigate the matter. *Id.* No such additional information or evidence appears in the record.

[2] Chainman's first day-after offers were deficient in the amount authorized for charging the first year's rental. The regulations indicate that an offer with a deficient payment can be corrected, and that the corrected offer "shall gain priority as of the date the filing is correct and complete." 43 C.F.R. § 3110.4(b). Under those circumstances, a deficient first day-after offer that is corrected the same day would retain its first day-after priority. However, despite Chainman's assertions, the record contains no evidence of an additional authorized charge to remedy the deficiency, and Chainman offers none in support of its appeal. Without any evidence to contradict the plainly inadequate rental payment documented in the record, the Board cannot conclude that Chainman's deficient offers were corrected the same day.⁴

[3] Finally, Chainman asserts that it was harmed because it relied on BLM's representation that it had won priority in the drawing on December 14, 2012, that BLM would issue a lease to Chainman within 60 days of the drawing for priority per its policy, but that it ultimately received the decision under appeal 71 days after the drawing. March 19 SOR at unp. 1-2; March 28 SOR at unp. 2; May 1 SOR at unp. 1. The Board has previously held that submission of a noncompetitive oil and gas lease offer does not create a right to lease issuance enforceable by the offeror against BLM.⁵ And, appellant's argument overlooks the fact that an offer that does not

⁴ There is a general rule that where relevant information "is in the possession of one party and not provided, then an adverse inference may be drawn that such information would be harmful to the party who fails to provide it." *Clay v. United Parcel Service, Inc.*, 501 F.3d 695, 712 (6th Cir. 2007), quoting *McMahan & Co. v. Po Folks, Inc.*, 206 F.3d 627, 632-33 (6th Cir. 2000). The Board follows this rule. *Twin Arrow, Inc.*, 118 IBLA 55, 59 (1991); *Patricia Alker*, 79 IBLA 123, 127 (1984).

⁵ In *Richard D. Sawyer*, the Board considered the appeal of a qualified noncompetitive lease offeror to whom BLM did not issue a lease within 60 days after receipt of the offer. 162 IBLA 339, 341 (2004). Although BLM is required to issue a lease "within 60 days of the date on which the Secretary identifies the first responsible qualified applicant," 30 U.S.C. § 226(c)(1) (2006), BLM did not identify the appellant in that case as a qualified applicant due to an oversight. An offer preceding issuance of a lease does not by itself provide any property right. *Richard D.* (continued...)

conform to applicable regulations gives rise to no rights, even if drawn first. *See Ballard E. Spencer Trust*, 544 F.2d at 1070. Indeed, a lease issued to a first drawn offeror must be cancelled if the first drawn offer was not in compliance with applicable regulations. *See McKay v. Wahlenmeier*, 226 F.2d 35, 46-47 (D.C. Cir. 1955).

In this case, BLM never issued a lease to Chainman. Indeed, if BLM had identified Chainman as the “first responsible qualified applicant,” that determination would have been in error since Chainman had submitted deficient offers that were not qualified for issuance of a lease. In any event, BLM’s delay in recognizing that Chainman’s offers were deficient is not a ground for concluding that the appealed decision rejecting the offers is in error.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, BLM’s decision is affirmed.

_____/s/_____
H. Barry Holt
Chief Administrative Judge

I concur:

_____/s/_____
James F. Roberts
Administrative Judge

⁵ (...continued)

Sawyer, 162 IBLA at 342. Therefore, in *Sawyer*, BLM properly rejected the pending offer after the land was withdrawn from mineral entry even though the offer apparently qualified for issuance of a lease prior to the withdrawal. *Id.* at 345.