

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Rapid Wireless, Ltd.)
Request for Waiver of)
Section 90.805 of the Commission's Rules)

ORDER

Adopted: May 23, 1997

Released: May 23, 1997

By the Acting Chief, Wireless Telecommunications Bureau:

1. The Wireless Telecommunications Bureau has before it a Request for Waiver of Sections 90.805(a) and 90.805(b) of the Commission's Rules¹ filed by Rapid Wireless, Ltd. ("Rapid").² By this Order, we grant Rapid's petition and thus waive Sections 90.805(a), 90.805(b), and 1.2104(g)(1) of the Commission's Rules.

Background

¹ 47 C.F.R. §§ 90.805(a) and 90.805(b). *See also* 47 C.F.R. § 1.2104(g)(1).

² Rapid Wireless, Ltd., "Request for Waiver of Section 90.805 of the Commission's Rules" (filed April 22, 1996), "Declaration of Douglas B. Sinclair" (filed April 22, 1996) and "Declaration of Elaine Presnell" (filed April 22, 1996), collectively, "Rapid Waiver Request."

2. On April 22, 1996, Rapid filed a request for waiver of the bid withdrawal payment provisions applicable to the 900 MHz Specialized Mobile Radio ("SMR") service auction.³ Specifically, Rapid seeks waiver of the payment with respect to its bid of \$2,629,890, which was ten times higher than its intended bid of \$262,989, for the L Block license, Market 015 (Miami, Florida).⁴ Under the Commission's Rules, the amount of the bid withdrawal payment is equal to the difference between the withdrawn bid amount and the amount of the subsequent winning bid, if the subsequent winning bid is lower.⁵ No withdrawal payment is assessed if the subsequent winning bid exceeds the withdrawn bid.⁶ At the time Rapid's waiver request was filed, there was no provision in the rules addressing erroneous bids that result from typographical or clerical errors.

3. The Commission has recently established procedures and guidelines for parties seeking waiver of the bid withdrawal payment provisions for erroneous or mistaken bids.⁷ To be eligible, a party must submit a request for a waiver, demonstrating that the bid in question was submitted in error. In addition, the waiver request must be accompanied by a sworn declaration attesting to the factual circumstances surrounding the erroneous bid.⁸ Relief is unavailable, however, if there is evidence that the bidder has engaged in insincere or frivolous bidding, such as strategically making mistaken bids, or has otherwise acted in bad faith.⁹ If the Commission finds that a bid is mistaken or erroneous, it then applies guidelines for granting partial waivers depending upon the round and stage of the auction in which the bid is made and withdrawn.¹⁰

³ *Id.*

⁴ The L Block was one of twenty spectrum blocks available in each of the 51 geographic areas in the 900 MHz SMR auction.

⁵ 47 C.F.R. § 90.805(b).

⁶ *Id.* See also 47 C.F.R. § 1.2104(g)(1).

⁷ See Atlanta Trunking Associates, Inc. and MAP Wireless, L.L.C., Request to Waive Bid Withdrawal Provisions, Order on Reconsideration, FCC 97-154 (rel. May 6, 1997) ("*ATA/MAP Recon Order*"); Atlanta Trunking Associates, Inc. and MAP Wireless, L.L.C., Request to Waive Bid Withdrawal Provisions, Order, 11 FCC Rcd. 17189 (1996) ("*ATA/MAP Order*").

⁸ See *ATA/MAP Order*, 11 FCC Rcd. 12158, 12159 (1996); PCS 2000, L.P., Request for Waiver of § 24.704(A)(1) of the Commission's Rules, Order, DA 96-2156 (rel. Dec. 20, 1996) at ¶ 3.

⁹ *ATA/MAP Recon Order* at 13; *ATA/MAP Order* at 21.

¹⁰ *ATA/MAP Recon Order* at 6; *ATA/MAP Order* at 17-18. The guidelines specify that if a mistaken bid is withdrawn in the round immediately following the round in which it was submitted, and the auction is in Stage I or Stage II, the withdrawal payment should be the greater of (a) two times the minimum bid increment during the round in which the mistaken bid was submitted, or, (b) the standard bid withdrawal payment calculated as if the bidder had made a bid at one bid increment above the minimum accepted bid. If a mistaken bid is withdrawn two or more rounds following the

4. Certain unique circumstances, however, may warrant a complete waiver of the bid withdrawal payment. The Commission recently granted the waiver requests of several bidders based upon a finding that its remote bidding system might have contributed to bidder confusion that caused their clerical errors.¹¹ This unique situation, the Commission concluded, warranted a complete waiver of the bid withdrawal payment rule.¹²

Rapid Waiver Request

5. In its request, Rapid alleges that, in Round 61 of the 900 MHz SMR auction, Elaine Presnell, one of its authorized bidders, typed in a bid of \$262,989 for License M015-L (Miami, Florida).¹³ However, for reasons which she did not understand, the bid software confirmation showed the bid to be \$2,629,890 -- ten times higher than her intended bid.¹⁴ Rapid withdrew its \$2,629,890 bid during the bid withdrawal period for Round 61 and reported the incident to Commission staff.¹⁵ The final high bid on this market at the close of the auction was \$805,000.¹⁶ Consequently, if the bid withdrawal payment requirement were fully enforced, Rapid would be subject to a bid withdrawal payment of \$1,824,890.

6. In support of its waiver request, Rapid asserts that its erroneous bid in Round 61 was due to an apparent software or communications problem and that the Commission's computer had indicated the incorrect bid amount.¹⁷ Rapid also argues that its bidding pattern in the 900 MHz SMR auction objectively confirms that it intended to bid \$262,989 in Round 61. Its predominant

round in which it was submitted, the bidder should not be eligible for any reduction in the bid withdrawal payment. Similarly, during Stage III of an auction, if a mistaken bid is not withdrawn during the round in which it was submitted, the bidder should not be eligible for any reduction in the bid withdrawal payment. *Id.*

¹¹ *ATA/MAP Recon Order* at 11-12. The parties demonstrated that the Commission's remote bidding system, which placed a zero in the bid submission field, might have contributed to some confusion causing the clerical error at issue. Specifically, the zero appeared when a bidder used the "Go to market" function. This function enabled the bidder to have only the specific market in which it might be interested appear on the screen. When it appeared, a zero was present with the cursor on the left of that zero. When a bid was entered, the zero remained on the screen and the additional numbers entered appeared to the left of the zero.

¹² *Id.*

¹³ Rapid Waiver Request at 3; Declaration of Elaine Presnell at 1.

¹⁴ *Id.*

¹⁵ Rapid Waiver Request at 3-4; Declaration of Douglas B. Sinclair at 3.

¹⁶ Rapid Waiver Request at 7.

¹⁷ *Id.* at 3; Declaration of Douglas B. Sinclair at ¶¶ 9-10.

bidding pattern, Rapid contends, was to increase its previous bid by five to ten percent,¹⁸ and its \$2,629,890 bid was erroneous and not strategic.¹⁹ Its erroneous bid and immediate withdrawal thereof, did not prejudice any other bidder, Rapid asserts, nor did it adversely affect the auction results.²⁰ Rapid alleges finally that strict application of the rule would not serve the public interest and thus a waiver is appropriate.²¹

Discussion

7. A waiver of the bid withdrawal payment provisions applicable to the 900 MHz SMR auction is appropriate when the petitioner "set[s] forth reasons in support thereof including a showing that unique circumstances are involved and that there is no reasonable alternative solution within existing rules."²² Applying this standard to the facts before us, we conclude that a complete waiver of the bid withdrawal payment provisions is justified.

8. The circumstances surrounding Rapid's bid of \$2,629,890 -- ten times higher than its intended bid -- persuade us that this bid was erroneous and was not placed for strategic reasons. As the Commission stated in the *ATA/MAP Order*, full imposition of the bid withdrawal payment rules in cases where the erroneous bid exceeds the intended bid by factors of 10 or more could impose an extreme and unnecessary financial hardship.²³ Our bid withdrawal rules are intended to discourage insincere bidding, and we do not believe it would serve the underlying purpose of the rules to enforce the rules in this case. We conclude that Rapid has demonstrated special circumstances warranting a complete waiver of the bid withdrawal payment rule. Specifically, it has shown that the Commission's remote bidding system may have contributed to confusion resulting in an irregularity previously acknowledged by the Commission as justifying a waiver of the bid withdrawal payment provision. Indeed, the situation here is the same as that presented to the Commission by bidders in the 900 MHz SMR and C Block auctions who were granted complete waivers in the *ATA/MAP Recon Order* after demonstrating that the Commission's

¹⁸ Rapid Waiver Request at 4-5. At the beginning of Round 61, the high bid for the Block L license in Miami was \$249,001, and the minimum required bid was \$262,000. *Id.* at 6.

¹⁹ *Id.*

²⁰ *Id.* at 6-7.

²¹ *Id.* at 7-9 (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969)), *cert. denied*, 409 U.S. 1027, 93 S.Ct. 461, 34 L.Ed.2d 321 (1972).

²² 47 C.F.R. § 90.151(a). *See also Northeast Cellular Telephone Co., L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (Commission may waive its own rules "for good cause shown," *i.e.*, where particular facts would make strict compliance with the rule inconsistent with the public interest.)

²³ *Id.*

remote bidding system, which placed a zero in the bid submission field, may have contributed to some confusion causing the clerical error at issue.²⁴

9. We note that the Commission has completed system enhancements to reduce the possibility of these types of mistaken bids. The bidding software has been revised so that the bid submission field is blank when a bidder begins entering its bid. In addition, further protections have been included in our spectrum auctions software to guard against the possibility of a mistaken bid by alerting bidders when a bid has been entered that is greater, by a certain factor of the minimum bid increment, than the minimum accepted bid for the round.

10. In view of these system enhancements -- which, if present, would have mitigated the situation presented by Rapid -- we conclude that it is in the public interest to grant Rapid's waiver request. Given the system enhancements, we do not anticipate that any bidder will commit this type of mistake in the future. We nonetheless strongly urge bidders to exercise great care when submitting their bids. We caution bidders that they will be faced with a heavy burden to show a mistaken bid and that it is unlikely the Commission will make similar exceptions for such mistaken bids in the future.

11. Accordingly, IT IS ORDERED that the Request for Waiver of Rapid Wireless, Ltd. IS GRANTED, and 47 C.F.R. §§ 90.805(a), 90.805(b) and 1.2104(g) of the Commission's Rules HEREBY WAIVED.

12. IT IS FURTHER ORDERED that the license YSM 037I (Jacksonville, Florida) IS GRANTED, effective upon the date of the release of this order. Grant of this license is expressly conditioned on timely execution and return by the licensee of a note documenting the licensee's installment payment obligations and a security agreement commemorating the Commission's security interest in the license in the event of default. This action is taken under delegated authority pursuant to Section 0.331 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Daniel B. Phythyon
Acting Chief, Wireless Telecommunications Bureau

²⁴ *ATA/MAP Recon Order* at ¶ 11.

