

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

DA 96-873

In the Matter of)
)
National Telecom PCS, Inc.)
Request for Waiver of)
Bid Withdrawal Payment)

ORDER

Adopted: May 30, 1996

Released: May 30, 1996

By the Chief, Wireless Telecommunications Bureau

1. On May 15, 1996, National Telecom PCS, Inc. (NatTel) filed a Request for Waiver (Request) of Section 1.2104(g)(1) of the Commission's Rules¹ governing payments for withdrawn bids for the broadband PCS C block² auction. For the reasons stated below, NatTel's Request is denied.

2. Background. On May 6, 1996, the Federal Communications Commission (FCC) completed its auction of 493 licenses to provide broadband Personal Communications Services (PCS) on the C block in the 2 GHz band.³ During the course of the auction, NatTel withdrew two high bids. At the conclusion of the auction, NatTel was the high bidder on one license (B-492, American Samoa) with a total net bid of \$411,000.75. On May 8, 1996, the FCC announced, by Public Notice, that the initial down payment of five percent of net winning bids and any bid withdrawal payments were due from all winning bidders on or before Wednesday, May 15, 1996.⁴ As a result of its withdrawal of two high bids, NatTel was obligated to submit an additional bid withdrawal payment of \$101,620 by May 15, 1996. Thus, to comply with the Commission's bid withdrawal and down payment requirements,⁵ NatTel was obligated to supplement its \$50,000 upfront payment with an additional deposit of \$81,070. NatTel did not submit the required deposit on May 15, 1996. Instead, NatTel submitted its Request relating to bidding conduct that occurred nearly two months earlier. NatTel contends that because it now

47 C.F.R. § 1.2104(g)(1); *see also* 47 C.F.R. § 24.704(a)(1).

The C block encompasses the 1895-1910 MHz band paired with 1975-1990 MHz band.

See News Release, "Broadband Personal Communications Services C Block Auction Closes" (rel. May 6, 1996).

Public Notice, "Entrepreneurs' C Block Auction Closes," DA 96-716 (rel. May 8, 1996).

See 47 C.F.R. §§ 24.704(a)(1) and 24.711(a)(2).

has a waiver request pending before the Commission, it was not required to pay the bid withdrawal payments assessed against it by May 15, 1996.⁶

3. The Commission recently issued an *Order* partially waiving the bid withdrawal payment requirements for certain bidders in the 900 MHz Specialized Mobile Radio (SMR) and broadband PCS C block auctions.⁷ The *Order* resolved the waiver requests of two applicants who submitted erroneous bids which were later withdrawn. The bids were found to be erroneous because they had exceeded the bidders' intended bids by factors of ten or more.⁸ The *Order* also delegated authority to the Wireless Telecommunications Bureau ("Bureau") to resolve requests for waiver of the bid withdrawal payment provisions involving similar factual circumstances.⁹ The *Order* indicated that for a party to be eligible for such a waiver, it must submit a request demonstrating that the bid in question was submitted in error. The waiver request must also be accompanied by a sworn declaration attesting to the veracity of the factual circumstances surrounding the erroneous bid submission.¹⁰

4. NatTel Request. On May 15, 1996, NatTel filed its Request seeking waiver of the bid withdrawal payment applicable to the broadband PCS C block auction. On May 24, 1996, NatTel submitted a "Supplement to Request for Waiver."¹¹ In its request, NatTel alleges that due to "miscommunications" between its principals and its administrative assistants, NatTel mistakenly submitted a bid of \$241,000 on License B-114 (Dodge City, KS) on Friday, March 22, 1996 during Round 57 of the C block auction.¹² In fact, our auction records indicate that NatTel submitted its \$241,000 bid on Monday, March 18, 1996 during Round 50.¹³ NatTel does not claim that the amount it bid on B-114 was in error. Instead, it claims that it placed a bid on this license "by virtue of a clerical mistake due to a miscommunication."¹⁴ NatTel also claims that it

Id. at fn. 1.

Order, Atlanta Trunking Associates, Inc. and MAP Wireless L.L.C. Requests to Waive Bid Withdrawal Payment Provisions, FCC 96-203 (rel. May 3, 1996) (*Order*); *see also Order*, Georgia Independent PCS Corporation Request to Waive Bid Withdrawal Payment Provision, DA 96-706 (May 6, 1996) (on delegated authority, the Wireless Telecommunications Bureau partially waived the bid withdrawal payment requirement for Georgia Independent PCS Corporation's erroneous bid in the broadband PCS C block auction).

Id. at ¶ 15.

Id. at ¶ 26.

Id. at ¶ 21.

National Telecom PCS, Inc. "Supplement to Request for Waiver" ("Supplement") (filed May 22, 1996).

Request at 3-4.

FCC Broadband PCS Auction Submission Round Results, Auction ID: 5, Round: 50, High Bids (March 18, 1996).

Id. at 6.

withdrew its bid in the "very next round" following its submission.¹⁵ In fact, NatTel did not withdraw its bid until Round 58, or eight rounds after it was submitted.

5. Pursuant to our auction procedures, the FCC became the "placeholder" on this license at the second highest gross bid previously received on this license, or \$229,000. No bids were placed on this license during the following 29 rounds. Pursuant to our authority under Section 1.2103(a) of the Commission's Rules,¹⁶ on April 10, 1996, we reduced the minimum acceptable gross bid on the market to \$115,000, effective in Round 86. The final winning bid was \$136,500. 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.¹⁷ No withdrawal payment is assessed if the subsequent winning bid exceeds the withdrawn bid.¹⁸ Consequently, at the close of the auction, NatTel was assessed a bid withdrawal payment of \$78,375.¹⁹

6. NatTel argues that the maximum bid withdrawal payment it should be assessed for License B-114 is the difference between its withdrawn bid and the amount of the bid listed when the Commission became the "placeholder" on the license. NatTel contends that the Commission became the "top bidder" on this license after NatTel withdrew its bid. NatTel further contends that the Commission's decision to reduce the minimum accepted bid in Round 86 was "tantamount to a bid withdrawal by the Commission."²⁰ As a result, NatTel concludes that it can only be liable for the difference between its withdrawn high bid and the Commission's "withdrawn bid."²¹

7. NatTel also alleges that due to "miscommunications" between its principals and its administrative assistants, it mistakenly submitted a bid of \$648,000 on License B-476 (Williston, ND) in Round 58 of the C block auction.²² Again, NatTel does not claim that the amount it bid on B-476 was in error. Instead, it claims that it placed a bid on this License "by virtue of a

Request at 6 .

47 C.F.R. § 1.2103(a); *see also Second Report and Order* in PP Docket 93-253, FCC 94-61, 9 FCC Rcd 2348, released April 20, 1994 at para. 150, fn. 113.

47 C.F.R. § 24.704(a)(1).

See 47 C.F.R. §§ 1.2104(g) and 24.704(a)(1).

Public Notice, "Entrepreneurs' C Block Auction Closes," DA 96-716 (rel. May 8, 1996) at Attachment B. The bid withdrawal payment is calculated as the difference between the gross withdrawn bid and the gross winning bid, or the net withdrawn bid and the net winning bid, whichever is less. The "net" bid is the bid submitted net of the 25% bidding credit available to small businesses. *See* 47 C.F.R. 24.712(a).

Request at 6-7.

Request at 8; Supplement at 4.

Request at 8.

clerical mistake due to a miscommunication.¹²³ NatTel withdrew its bid during Round 58. The final winning bid on this market was \$617,000. Consequently, NatTel was assessed a bid withdrawal payment of \$23,245.²⁴

8. NatTel states that because its principals were forced to be out of the office traveling most of the time, it had to rely on administrative assistants to place bids and monitor bidding eligibility. In many instances, NatTel's principals "were simply not available and were therefore unable to give specific bidding instructions to their assistants at the required time."²⁵ In those instances, NatTel's administrative assistants "were forced to operate on assumptions and instructions which, unbeknownst to NatTel's principals, were no longer valid."²⁶ As a result, NatTel's administrative assistants "entered bids on markets in which NatTel had no interest in bidding."²⁷ NatTel further argues that its withdrawal of its bids "immediately" after they were submitted demonstrates that the bids were submitted in error. NatTel also argues that the Commission's *Order* reducing the bid withdrawal payments for the erroneous bids of Atlanta Trunking Associates, Inc. and MAP Wireless, L.L.C.²⁸ requires us to grant NatTel's Request. Finally, NatTel argues that the bid withdrawal payments should be waived because the amounts involved are "immaterial" to the overall total amount of bids in the C block auction.²⁹

9. Decision. Under the facts presented, NatTel has not demonstrated that its bids on B-114 in Round 50 and B-476 in Round 58 were submitted in error. We are not convinced that a prompt withdrawal³⁰ of a bid alone is evidence that the bid was erroneously submitted. We also do not believe that any relief should be available to bidders who attempt to disclaim responsibility for their bids due to their inability to direct and supervise their administrative assistants. During the time periods of the allegedly mistaken bids, NatTel's principals were on travel and "simply not available and were therefore unable to give specific bidding instructions to their assistants at the required times. In those cases, NatTel's administrative assistants were forced to operate on assumptions which, unbeknownst to NatTel's principals, were no longer valid given the existing

Id. at 6.

Public Notice, "Entrepreneurs' C Block Auction Closes," DA 96-716 (rel. May 8, 1996) at Attachment B.

Request at 6.

Id.

Id. at 4.

Order, Atlanta Trunking Associates, Inc. and MAP Wireless L.L.C. Requests to Waive Bid Withdrawal Payment Provisions, FCC 96-203 (rel. May 3, 1996).

Supplement at 2-3.

As noted above, NatTel's withdrawal of its bid on B-114 (Dodge City, KS) did not occur until eight rounds after it was submitted. The eight-round delay between NatTel's bid submission and withdrawal undermines NatTel's own argument that the bid was submitted in error.

bidding situation."³¹

10. It appears that NatTel experienced internal operating problems which it was not able to overcome through the establishment of adequate bidding procedures. We also note that the administrative assistants NatTel' principals relied on to make bidding decisions appear not to have been listed as persons authorized to make or withdraw bids on NatTel's short-form application (FCC Form 175). The list of authorized bidders includes the two principals mentioned in NatTel's request, Mr. Jack E. Robinson and Mr. Daniel E. Carpenter, and Mr. James M. Craig. Under the Commission's auction procedures, only those persons listed on an applicant's short-form application are authorized to make or withdraw bids.³² Notwithstanding the fact that NatTel, as detailed in its Request, did not follow such procedures, it is a fundamental precept of the law of agency that a principal is responsible for the acts of an agent performed within the scope of employment.³³ As a result, we are not persuaded that the events described by NatTel warrant a waiver of the bid withdrawal payment requirements. In fact, we are concerned that to grant NatTel's Request would encourage future bidders to hide behind the alleged mistakes of their staff to avoid responsibility for their bids. Such a result would not be in the public interest.

11. We also disagree with NatTel's argument that the maximum bid withdrawal payment it should be assessed for License B-114 is the difference between its withdrawn bid and the amount of the bid listed while the Commission became the "placeholder" on the license. NatTel's argument is premised on a mischaracterization of the Commission as a high bidder on a license after an auction participant withdraws a bid. While the Commission assumes a "placeholder" role on a license after a bid is withdrawn, the Commission never becomes a bidder on that license, for it could never "win" a license. Therefore, our decision to reduce the minimum accepted bid cannot be analogized to a bid withdrawal. The Commission chose to reduce the minimum accepted bid on License B-114 in Round 86 of the auction because the auction appeared to be winding down. At that point, the auction was in its third and final stage, the number of new bids had declined to approximately 40 per round, and the amount of bidder eligibility had declined dramatically. Thus, the opportunities for other bidders to obtain the license during the auction were quickly diminishing. Had the Commission not chosen to reduce the minimum accepted bid, NatTel would remain subject to a bid withdrawal payment of the difference between its withdrawn bid and the price the license would ultimately sell for. NatTel assumed the risk that it would be subject to a substantial bid withdrawal payment when it withdrew its bid.

Request at 3-4.

See Public Notice, "FCC Issues New Procedures, Terms and Conditions for Broadband PCS C block Auction" (rel. Oct. 6, 1995) at 4-5 ("Only those individuals listed on the FCC Form 175 will be authorized to place or withdraw bids for the applicant during the course of the auction").

See also Wadeco, Inc. v. FCC, 628 F.2d 122 (D.C. Cir. 1980); Eleven-Ten Broadcasting Corp., 32 FCC 706 (1962); recon. denied 33 FCC 92 (1962); affirmed sub. nom. Immaculate Conception Church of Los Angeles, et al., 320 F.2d 795 (1963), cert. denied, 375 U.S. 904; KWK Radio, Inc., 34 FCC 1039 (1963), recon. denied, 35 FCC 561 (1963); affirmed in KWK Radio, Inc. v. FCC, 337 F.2d 540 (1964); and Continental Broadcasting, Inc., 15 FCC 2d 120 (1968).

12. In addition, we disagree with NatTel's contention that because it filed its Request on the day that down payments and bid withdrawal payments were due, it was not obligated to submit the additional sums due for its bid withdrawal payments. In this connection, NatTel seeks to bolster its presumption that the May 15, 1996 filing of its Request relieved it of its obligation to comply with the down payment and bid withdrawal payment deadline by pointing to Commission actions taken with respect to certain applicants in the 900 MHz Specialized Mobile Services (SMR) and the broadband PCS C block auction.

13. We find that NatTel's status as of May 15, 1996 is distinguishable from that of other bidders with pending waiver requests at the close of the 900 MHz SMR and broadband PCS C block auctions. NatTel filed its Request nearly two months after it withdrew the bids at issue, nine days after the C block auction closed, and seven days after the release of the Public Notice identifying the winning bidders and the amounts owed at the down payment deadline. By contrast, Atlanta Trunking Associates, Inc. (ATA) filed its request for waiver³⁴ three days after it submitted its erroneous bid and more than four months before the 900 MHz SMR auction closed. Similarly, PCS 2000, L.P. (PCS 2000) filed its request for waiver³⁵ three days after it submitted its allegedly erroneous bid and nearly four months before the broadband PCS C block auction closed. Because ATA and PCS 2000 filed their requests shortly after they submitted their allegedly erroneous bids, and because the Commission had not yet ruled on the requests prior to the close of the respective auctions, the Bureau exercised its discretion and did not require payment of the full bid withdrawal payment by the down payment deadline.³⁶ NatTel, however, did not file its Request shortly after the withdrawal of the bids at issue. Rather, the bids which are the subject of NatTel's Request occurred nearly two months earlier. In fact, it filed its Request nine days after the close of the auction. Thus, the Commission was not afforded an opportunity to rule on the Request prior to the down payment and bid withdrawal payment deadline or to treat NatTel similarly to ATA and PCS 2000. Under these circumstances, we do not believe that any relief from the payment deadline should be granted. We are concerned that to extend the deadline for NatTel would encourage future bidders to submit last-minute waiver requests in lieu of payment obligations at the time these obligations become due. Accordingly, NatTel remains subject to the bid withdrawal payment obligations for its withdrawn bids on Licenses B-114 and B-476.³⁷

14. Given NatTel's decision to file a last-minute waiver of its bid withdrawal requirement, the appropriate response would have been to make the required payment and simultaneously file its Request. This course of action would have preserved NatTel's position as the "winning bidder" on License B-492. Under Section 1.2109(b) of the Commission's Rules, a winning bidder

Atlanta Trunking Associates, Inc., "Request for Waiver" (December 18, 1996).

PCS 2000, L.P., "Request for Expedited Waiver or Reduction of Withdrawal Penalty" (January 26, 1996).

See Public Notice, "FCC Announces Winning Bidders in the Auction of 1,020 Licenses to Provide 900 MHz SMR in Major Trading Areas," DA 96-586 (April 15, 1996) at 5; *Public Notice*, "Entrepreneurs' C Block Auction Closes," DA 96-716 (May 8, 1996) at fn. 2.

See Public Notice, "Entrepreneurs' C Block Auction Closes," DA 96-716 (rel. May 8, 1996) at Attachment B.

who fails to remit the required down payment within five business days after the Commission has declared competitive bidding closed shall be deemed to be in default.³⁸ Because NatTel failed to meet its down payment and bid withdrawal payment obligations, NatTel is deemed to be in default on its payment obligation for License B-492 (American Samoa). NatTel is therefore subject to the default payment obligations specified under Sections 1.2104(g)(2), 1.2109(c), 24.704(b)(2) and 24.708(b) of the Commission's rules.³⁹

ORDERING CLAUSES

15. Accordingly, IT IS ORDERED that the Request for Waiver filed by NatTel on May 15, 1996, IS DENIED.

16. IT IS FURTHER ORDERED that NatTel is deemed to be in default on its payment obligation for License B-492.

17. IT IS FURTHER ORDERED that NatTel is subject to the default payment on License B-492 specified under Sections 47 C.F.R §§ 1.2104(g)(2), 1.2109(c), 24.704(b)(2) and 24.708(b) of the Commission's Rules.⁴⁰

FEDERAL COMMUNICATIONS COMMISSION

Michele C. Farquhar
Chief, Wireless Telecommunications Bureau

47 C.F.R. § 1.2109(b).

47 C.F.R §§ 1.2104(g)(2), 1.2109(c), 24.704(b)(2) and 24.708(b).

47 C.F.R §§ 1.2104(g)(2), 1.2109(c), 24.704(b)(2) and 24.708(b).