



April 2009

Winning Bidder Seeks Refund for Unbuildable Permit

Steve Lovelady
lovelady@fhhlaw.com
703-812-0517

If you are thinking about participating in the FCC's upcoming FM Auction 79 (*see* related article on page 6), you should pay attention to what happened to the "winning" high bidder in a similar FCC auction in 2004. That bidder recently petitioned the FCC for a refund of the nearly \$4.4 million it paid to the FCC for an FM construction permit in Auction 37. The reason? Supposedly unsolvable interference problems with frequencies used by the FAA to guide planes making instrument landings at airports. Because of those problems, the station can't be built out – not, at least, consistently with its CP.

The bidder in question was a big player in Auction 37, winning 10 CP's with bids totaling over \$15 million. Its highest bid (and the third highest bid in the entire auction of over 250 permits) was \$4.4 million for a permit to build a Class A station serving beautiful downtown Pacific Junction, Iowa. Located about 20 miles south of Omaha, Pacific Junction may have been the bidder's ticket into the Omaha, Nebraska/Council Bluffs, Iowa market. There certainly appears to have been some method to the bidder's madness, as it subsequently upgraded the permit to Class C2 (increasing the power about 20-fold) and paid to move another station in the market so that its new-and-improved facilities could be built out. It signed a lease for its designated tower, started paying rent for the tower, and even started buying equipment to build the station. Life was good.

The fatal arrow that pierced the bidder's heel, however, was a technical requirement involving the tower it was planning to use. The tower was already built (with another radio station up and running on it) and no increase in tower height was needed, so normally no FAA clearance would have been required. But what the bidder apparently didn't know and hadn't counted on was the fact that the tower's original FAA clearance contained a condition that any new radio station added to the tower would require frequency coordination with the FAA. The tower owner (not the bidder, since it wasn't the bidder's responsibility) dutifully complied with this requirement, notifying the FAA in late 2007 that it intended to install the bidder's FM broadcast antenna on the tower.

The FAA responded with a "Notice of Presumed Hazard". Bad news indeed. The FCC won't let you operate if you're going to endanger air traffic. Good if you are flying in an

airplane – bad if you’ve just sunk millions of dollars into a construction permit for a station that can’t be built.

Our bidder hired all sorts of well-connected FAA and FCC frequency coordination consultants to work directly with the FAA to resolve the interference problem, but they ultimately concluded that even if the station’s power were reduced to as low as 100 watts, there was simply no location anywhere within the area in the station could be built consistent with FCC rules that wouldn’t create FAA frequency interference problems. At this point, the tab for the permit, consultant and legal fees, equipment and other costs exceeded \$5.5 million according to the bidder.

This past March, over four years after it “won” the auction for the Pacific Junction CP, the bidder effectively threw in the towel, filing a petition for a refund of its bid payment, plus interest since 2004. The reason? The FCC breached its implied contract with the auction’s winning bidders to deliver permits for stations that could actually be built.

The petition cites a recent federal court of appeals ruling supposedly recognizing the existence of a contract between the FCC and successful bidders in spectrum auctions, as well as the landmark NextWave case, in which the FCC returned bids to winning PCS spectrum bidders in a convoluted bankruptcy proceeding. The Pacific Junction bidder states that it “stands ready, willing and able” to build the station, but for the fact that the FCC’s rules are preventing construction – invoking classic legal wording for breach of contract cases.

So the bidder wants its \$4+ mil back. Likelihood of success? Limited.

In the public notice announcing Auction 37, the FCC included **bold-faced** wording to the effect that each bidder would be solely responsible for evaluating all technical and market factors bearing upon the value of the permits available in the auction. This disclaimer is standard operating procedure in FCC auction notices, which routinely exhort would-be auction participants to conduct their own due diligence before bidding. Expect to see the FCC cite those disclaimers when it addresses the bidder’s request.

On the other hand, the bidder does point out that the FAA’s navigation frequency databases are not publicly available, and the FCC does not make them available either. As a result, says our bidder, the frequency interference problems that prevented construction were known only to a select few who either worked for or with the FAA – and secret rules cannot be permitted to cost it millions of dollars.

Perhaps, but what about that original FAA determination of no hazard issued to the tower? If that determination contained the condition, and if that determination is publicly

accessible, might that not have tipped the bidder off to the potential problem? That's unclear at this point, but if those "ifs" turn out to be the case, that would not be helpful to the bidder's case.

In a footnote to its petition for a refund, the bidder states that it is contemplating a Court of Claims action to recover its funds. Given that the one federal court case cited by the bidder with respect to the contractual nature of FCC auctions has dragged on for years – achieving *Jarndyce v. Jarndyce* status in communications jurisprudence – it may be a long time before our bidding friend sees its money, even if its litigation strategy pans out.

So, if you are thinking about participating in the upcoming FM Auction 79, when you read the Public Notice setting forth the bidding procedures, deadlines, etc., and get to page 10 with the section titled "Due Diligence", please remember the plight of the guy with the Pacific Junction CP and do your homework *before* you decide to bid (then do it again, just to make sure).