

# Judge Robles's Guidelines for §363 Sales

## 1. Introduction

These guidelines are intended to provide parties with general information regarding the procedures that apply to auctions of estate property in cases before the Hon. Ernest M. Robles. They are intended only as a supplement to the Local Bankruptcy Rules, Federal Rules of Bankruptcy Procedure, and the Bankruptcy Code, and do not attempt to reiterate, restate, or vary the Code or Federal and Local Rules in any respect. Attorneys and real estate brokers are encouraged to discuss these guidelines with their clients so that all parties will arrive at the auction knowing what to expect. The Court may deviate from these guidelines in unusual situations or for good cause. Parties, via motion, may seek a variance from these guidelines. If the Court intends to deviate from these guidelines, the parties will be apprised of any alternative procedures in the tentative ruling that the Court issues prior to the auction.

## 2. Auction Location

Auctions for commercial and residential real property, vehicles, and other assets worth less than \$10 million are generally conducted in open court on the record.

Auctions in which the bids consist of various types of consideration—such as a combination of cash, the assumption of certain liabilities, the extension of credit, and/or the issuance of equity shares—are generally conducted offsite. Auctions of this type often require an investment banker or other financial professional to assign a weighted value to bids comprised of multiple forms of consideration, typically last one or more days, and generally involve corporate bidders represented by counsel. The assets sold in such auctions are usually going-concern businesses, intellectual property, and other intangible assets. Valuation of such assets is more difficult and complex than the valuation of vehicles or real property. For an example of an auction of this type that would be conducted offsite, see *In re Gardens Regional Hospital and Medical Center*, Case No. 2:16-bk-17463-ER, Doc. Nos. 142, 147, and 153. Trustees or debtors-in-possession conducting an auction with this level of complexity are strongly encouraged to obtain a transcript of the proceedings, which, if available, should be filed by no later than two court days prior to the hearing seeking approval of the sale.

Auctions of multiple items (for example, lots of used restaurant equipment, unsold inventory, office supplies, etc.) are also generally conducted offsite. In the Court's experience, the employment of a professional auctioneer typically results in the estate obtaining optimal value for these types of assets. Notwithstanding Local Bankruptcy Rule ("LBR") 6004-1(c)(1)(B), the Court generally approves the auction of lots of multiple items after notice of opportunity for hearing under LBR 9013-1(o), even where the auction is subject to overbid or where the Trustee or debtor-in-possession has been contacted by potential overbidders.

## 3. Motions for the Approval of Sale Procedures

For most auctions involving assets such as vehicles and real estate that are easy to value (see ¶2, above), a motion for an order establishing sale procedures need not be made separately from

a motion seeking approval of the sale—that is, the movant may seek the approval of sale procedures concurrently with the motion seeking approval of the sale.

Complex sale procedures motions involving hard-to-value assets (see ¶2, above) should be heard in advance of the motion seeking approval of the sale. For an example of such a sale procedures motion, see *In re Gardens Regional Hospital and Medical Center*, Case No. 2:16-bk-17463-ER, Doc. Nos. 142, 147, and 153.

#### **4. Bidding Procedures for Auctions Conducted in Open Court**

Auctions held in open court are conducted by Judge Robles. The Court will first identify the asset to be auctioned and determine if bidders are present in the courtroom. Qualified bids and overbids are subject to the terms and conditions of the auction procedures set forth in the motion, to the extent granted by the Court.

Next, the Court distributes numbered auction paddles to all qualified bidders. Bidders are subsequently identified by reference to their paddle number. Bidding increments are set by the Court and are subject to adjustment depending upon the bidding. The Court announces each bid level. To remain in the auction, bidders must participate at all bid levels. That is, parties who do not bid in a round cannot later change their minds and re-enter the auction. Parties may make a bid higher than that announced by the Court by approaching the podium and stating their bid.

Auctions begin promptly and will not be delayed to accommodate the late arrival of bidders. Attorneys and real estate brokers should advise bidders to arrive at the courthouse at least 45 minutes prior to the hearing time, so that bidders will have sufficient time to locate parking and undergo mandatory security screening. Bidders must present a valid, government-issued photo identification in order to gain admission to the courthouse. Bidders who arrive at the courthouse without a valid photo identification will be denied entry and will lose the ability to participate in the auction.

#### **5. Break-Up Fees**

A break-up fee of up to 4% of the purchase price may be approved, where sufficient evidence has been presented showing that the stalking horse bidder's participation resulted in a material increase in the ultimate sale price. Break-up fees are appropriate where an asset is difficult to value and the stalking horse bidder's participation creates a floor price. Examples include operating businesses, art or memorabilia, intellectual property, shares of stock that are not publicly traded, and other intangible assets. Expense reimbursements may also be approved, but again only where a showing has been made that the stalking horse bidder's participation increased the sale price.

Break-up fees or expense reimbursements with respect to assets that can be easily valued—such as residential real estate and vehicles—generally do not encourage bidding and are therefore rarely approved.

## **6. Submission and Entry of the Order Approving the Sale**

In the event that an opposition or limited opposition is filed, the Court encourages the moving party to attempt to obtain from opposing counsel approval as to the form of the order approving the sale (the “Sale Order”), pursuant to LBR 9021-1(b)(3)(C). Obtaining approval as to form before the proposed order is lodged allows the Court to enter the Sale Order more quickly. Pursuant to LBR 9021-1(b)(3)(C), where the form of the order is agreed upon, all counsel should endorse the order indicating approval as to form, so that the Court is aware that objections as to form have been waived. Where parties cannot agree upon the form of the Sale Order, opposing counsel will frequently be ordered to file objections to form sooner than the seven-day period specified by LBR 9021-1(b)(3)(B).

## **7. Bankruptcy Rule 6004(h) Stay**

To facilitate expeditious closing of the sale, the Court typically waives the 14-day stay imposed by Bankruptcy Rule 6004(h). Parties seeking to preserve their ability to obtain appellate review of an order approving a sale must usually file an emergency motion for a stay pending appeal.

## **8. Back-up Bidders**

The Court generally approves back-up bidders (that is, bidders who will purchase the property in the event the winning bidder fails to close). Entities are not designated as back-up bidders unless they are willing to commit to performing under their back-up bid; that is, a back-up bidder cannot later withdraw its back-up bid. If the winning bidder defaults, the Trustee or debtor-in-possession is not required to obtain additional court approval in order to close the sale with the back-up bidder. The proposed Sale Order should contain a provision authorizing the closing of the sale to the back-up bidder in the event of default by the winning bidder.

## **9. Liquidated Damages**

The Court generally approves provisions requiring the winning bidder to pay the Trustee or debtor-in-possession liquidated damages in the event the winning bidder fails to close.

## **10. Section 363(m) Findings**

The Court will not enter a finding that the purchaser is entitled to the protections afforded by §363(m) unless such a finding has been explicitly requested in the motion seeking approval of the sale (the “Sale Motion”). Movants seeking §363(m) protection with respect to a stalking horse bidder should submit declaration(s) with the Sale Motion as evidence of the stalking horse bidder’s good faith. In the event the stalking horse bidder does not prevail at the auction, the Court will take testimony from the winning bidder to determine whether that bidder is entitled to the protections of §363(m).

## **11. Questions or Comments**

If you have questions or comments about Judge Robles's auction procedures, please contact law clerk Daniel Koontz at 213-894-0295.