

AUCTION SALES – BIDDING PROCEDURES

Hon. Vincent P. Zurzolo, U.S. Bankruptcy Judge

August 3, 2017

11 U.S.C. § 363 --- FRBP 6004. 9014 --- LBR 6004-1

1. Approval Process for Bidding/Auction Procedures: Pursuant to LBR 6004-1(b), a party may file (and set for hearing) a separate motion to approve bidding/auction procedures before filing a motion to approve sale of property. Another option is to request approval bidding/auction procedures as part of filing a motion to approve sale of property. **Please be aware that, if approval of bidding/auction procedures is not requested in advance by a separately-filed motion**, it may be difficult for the movant to persuade the Court to approve a break-up fee or expense reimbursement for a stalking horse bidder, or to preclude a party from bidding on or before the auction, on the grounds that the proposed bidder has not complied with proposed bidding/auction procedures.

2. Auction Location/Identity of Auctioneer: The motion that requests bidding/auction procedures must provide notice of whether the movant requests that the auction be held by Judge Zurzolo at the hearing on the motion to approve sale, or by the movant at another location and time. If the auction is conducted at a location outside of court, the movant is not required to provide the court with a transcript of the auction proceedings in order to obtain later-approval of a sale. Movant is required to file a declaration as to the outcome of the auction.

3. Compliance with Bidding/Auction Procedures: Parties must comply with all bidding procedures approved by the Court, including minimum overbid increments. **Please note**: Setting a minimum overbid increment does not prohibit a party from increasing their bid by more than the minimum increment. A bidder may also stop bidding at any time, and resume bidding later in the auction process, as long as the auction has not been concluded by that point.

4. Expense Reimbursement; Breakup Fees: Judge Zurzolo generally does not grant a provision in a bidding procedures motion to approve both an expense reimbursement and a break-up fee for a stalking horse bidder.
 - a. Expense Reimbursement: Judge Zurzolo generally approves reimbursement of the stalking horse bidder's *actual* expenses up to a maximum amount, rather than a "flat fee" expense reimbursement that does not require evidence that expenses were actually incurred.

 - b. Breakup Fees: Judge Zurzolo requires admissible evidence of the reasonableness of a proposed break-up fee.

5. Good Faith Purchase: Movant is required to file admissible evidence to support a finding under 11 U.S.C. 363(m) that the purchase is in good-faith. This evidence may be a declaration from movant, purchaser, or both, depending on the circumstances. Judge Zurzolo does not allow introduction of live testimony of witnesses at a hearing on motion to approve sale, unless a party files a separate motion under FRBP 9014(e) and the court enters an order granting that motion well in advance of the hearing.

6. FRBP 6004(h): 14 day waiver: Please indicate in the motion to approve sale if the movant seeks a waiver of the 14-day stay of FRBP 6004(h). If no party files an opposition to the motion to approve sale, or if all objections to the motion were resolved consensually by the conclusion of the hearing on motion to approve sale, Judge Zurzolo is generally willing to include a waiver provision in the order granting motion to approve sale.

7. Approval of Backup Bidders: Often an auction will result in: (1) a successful bidder; and (2) a party who has the second highest bid and desires to be considered an approved backup bidder. At that time, the court will clarify with the movant, the successful bidder, and the approved backup bidder that the order granting the motion to approve sale will include provisions that authorize or require the backup bidder to perform obligations of the sale in the event the successful bidder fails to close the sale. If the situation arises in which the successful bidder does not close the sale, the parties do not need another court order to approve a sale to the backup bidder, providing that the sale to the backup bidder occurs according to the terms included in the order granting the motion to approve sale. If the movant makes an agreement to sell the property to the backup bidder on terms different from those contained in the order granting motion to approve sale, the movant must file a new motion to approval sale.