

# Terms and Conditions of Sale in Bankruptcy Auctions



Every bankruptcy auction is governed by written terms and conditions of sale that are given to registered bidders and announced before the calling of the auction. Bankruptcy auctions present unique problems which must be considered when drafting the terms and conditions of sale.

Unlike private auctions, the bankruptcy auction is overseen by the bankruptcy judge, by creditors and by the seller, which can be a debtor or a trustee. To protect the integrity of the judicial process, the bankruptcy auction must have the appearance of fairness as well as being fair. The concept of fairness is expressed in the idea that the auction process needs to be “transparent” and that creditors and bidders may complain to the court if the process seems unfair. In addition, bidders must act in *good faith*, which means there must be no fraud or other improper conduct that taints the auction. In order to promote fairness, predictability and public confidence in the auction process, the terms and conditions that govern the auction should spell out in detail the procedures for bidding and the rights and remedies of the successful bidder, the seller and the other parties with a direct interest in the outcome of the auction.

A non-exclusive checklist of Terms and Conditions of Sale includes the following:

1. Timing and procedures for the sale and the court hearing to approve the sale results
2. Requirements bidders must meet in order to qualify to bid
3. Where to get information and procedures for conducting due diligence
4. Place and time of the auction and rules for adjournments
5. Form of purchase contract. Are variations from the standard form permitted?
6. Absence of seller’s warranties and representations
7. Form of payment, usually cash. No financing contingencies on bids
8. Description of what is being sold
9. Minimum purchase price; bidding increments; overbids.
10. Any pre-emptive rights, match rights or rights of first refusal?
11. Can bids be withdrawn after the hammer falls, but before court approval?

12. Does the losing bidder have to keep its bid open as a standby bid if the high bidder defaults?
13. Buyer’s remedies if the seller refuses to close. Damages? Specific performance?
14. Seller’s remedies against a defaulting buyer. Provisions for liquidated damages and retention of bidder’s deposit.
15. Can the seller’s secured creditors make non-cash bids (credit bids) against a cash buyer?
16. When can a junior secured creditor make a credit bid?
17. Bidders must submit to the exclusive jurisdiction of the bankruptcy court to decide all disputes.
18. If there is an initial bidder against whom others are bidding, what special rights does the initial bidder have?
19. Is the sale free and clear of all liens, claims and encumbrances, so the winning bidder gets clear title?
20. Has proper notice of the sale been given to all parties entitled to notice?

The auctioneer should be alert to terms and conditions that may discourage bidders from attending the auction and depress prices. For example, if the seller has the unfettered right to reject all bids, then many bidders may elect not to incur the expense of conducting due diligence. Similarly, if the first bidder has negotiated tough bidder protection devices like the right to match the highest offer of other bidders, other bidders may choose not to waste their time. The experience of the professional auctioneer with real life auctions is incredibly valuable in formulating terms and conditions of sale that not only are fair but also foster the goal of maximizing the sale price.

The terms and conditions of sale generally are approved by an order of the bankruptcy court and the auction process then proceeds. Most court approved terms and conditions of sale give the seller considerable discretion to modify the terms of sale, even after the auction has commenced. However, if circumstances change requiring the material modification of the court-approved terms and conditions, the bankruptcy judge should approve the changes, after hearing on appropriate notice. This process gives bidders assurance that the changes are not arbitrary or intended to favor one bidder over another.



What happens if sale procedures are changed without court approval? Courts have varying practices concerning the degree to which they will tolerate departures from announced bid procedures. Most commonly, this issue is presented when nonconforming, but valuable, bids are submitted. Although some judges will not permit deviation from previously approved bidding procedures, others will do so if it will maximize the estate and if bidders had notice of the debtor's right to decline bids and the court's continuing jurisdiction over bids. It is important to be attuned to the preferences of individual judges based on prior auctions they have supervised.

An auctioneer should not summarize or paraphrase the auction terms or procedures in a way that could be construed as modifying

the terms of auction. If the auction is held in the bankruptcy judge's courtroom a court reporter will be present to transcribe what is said so that there is a written record of the auction. In these circumstances, each bidder has to identify itself "on the record" and orally state its bid and any conditions, since the court reporter does not transcribe gestures. In most court auctions the bidder's attorney is present. If questions or ambiguities arise during the auction, the auctioneer should ask for clarification so that there is a complete record of the bid. If the bankruptcy judge is presiding over the auction, then the parties can also ask the judge to resolve any ambiguities.

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