Business Workouts Manual § 37:31

Business Workouts Manual
Database updated December 2015

Matthew W. Kavanaugh [a0], Randye B. Soref [a1]

Chapter 37. Selected Topics in § 363 Bankruptcy Asset Sales

§ 37:31. Stalking-horse bidding protections and incentives in bankruptcy asset sales—Stalking-horse bidders

In the bankruptcy setting, a “stalking-horse” bidder is an interested buyer of a debtor's assets that agrees to certain protections or incentives from the debtor in order to be the first initial bidder for those assets. As the initial bidder, the stalking-horse bidder sets the “minimum” floor price for the assets and generally the other initial terms of the sale and bidding and auction process by the drafting of an initial asset purchase agreement.

Since a stalking-horse bidder is vulnerable to higher and better bids in a bankruptcy auction, and ultimately may not be the winning bidder, both the debtor and the initial bidder are incentivized to negotiate stalking-horse protections. Such protections offer the initial bidder compensation for its fees and expenses associated with due diligence, negotiations and the sale process, and for the risk of missing other opportunities during the bidding and sale process. Absent these protections and incentives “bidders would be reluctant to make an initial bid for fear that their first bid will be shopped around for a higher bid from another bidder who would capitalize on the initial bidder's (i.e., ‘stalking-horse's’) due diligence.” [1] Debtors agree to these protections and incentives to encourage initial bids (where no competing bidders exist) and to obtain a high initial bid and floor price for a subsequent auction. [2]

Footnotes

a0 Buchalter Nemer

a1 Polsinelli, LLP
Editors

1 In re Hupp Industries, Inc., 140 B.R. 191, 194, 22 Bankr. Ct. Dec. (CRR) 1523 (Bankr. N.D. Ohio 1992), citing In re Integrated Resources, Inc., 135 B.R. 746, 750, 22 Bankr. Ct. Dec. (CRR) 738 (Bankr. S.D. N.Y. 1992), order aff'd, 147 B.R. 650, 23 Bankr. Ct. Dec. (CRR) 1042 (S.D. N.Y. 1992).

2 In re APP Plus, Inc., 223 B.R. 870, 874, 34 Bankr. Ct. Dec. (CRR) 1153, 42 Collier Bankr. Cas. 2d (MB) 964 (Bankr. E.D. N.Y. 1998).