

OFFICE OF THE UNITED STATES TRUSTEE
Northern District of Texas

GUIDELINES FOR AUCTION SALES

January 19, 2006

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INTRODUCTION

These Guidelines have been issued by the United States Trustee for the Northern District of Texas as part of his responsibilities under 28 U.S.C. §586(a)(1) and (a)(3) to establish, maintain and supervise a panel of private trustees to serve in chapter 7 cases, and to supervise the administration of cases and trustees in cases under chapter 7 of title 11. The purpose of the Guidelines is to insure compliance by trustees and auctioneers with the requirements of the Bankruptcy Code and Rules, the United States Trustee Program's Chapter 7 Initiative, and the Handbook for Chapter 7 Trustees concerning auction sales of estate property and compensation of auctioneers.

These Guidelines are divided into five parts: Auction Sales and Retention of Auctioneers; Conducting Auction Sales; Report of Sale; Payment of Auctioneers; and Internet Auctions.

PART I - AUCTION SALES AND RETENTION OF AUCTIONEERS

A trustee's decision to liquidate property of an estate by auction should be based on the trustee's reasoned determination that an auction sale has the greatest potential to maximize asset values and increase the return for the estate. The following procedures should be used by a trustee in preparing for an auction sale:

A. Comply with the provisions of the Bankruptcy Code and Rules governing the liquidation of estate property.

Trustees must comply with the provisions of 11 U.S.C. 363 concerning the sale of estate property. Section 363(b) provides that the trustee, after notice and a hearing, has the power to sell estate property. The provisions of Federal Rule of Bankruptcy Procedure (FRBP) 6004 govern the notice which must be provided regarding such a sale. The debtor, all creditors and indenture trustees, and the United States Trustee are entitled to receive twenty days notice by mail of a proposed sale, although the Court may shorten this period for cause. FRBP 2002(a)(2) and 2002(k). If proper notice is given and no objections are received, the trustee may proceed to sell the assets in question upon entry of an order of the Court. A notice of sale should, at a minimum, include the following information:

- ▶ the location, date and time of the proposed sale;
- ▶ an inventory or description of the assets to be sold;
- ▶ the terms and conditions of sale; and
- ▶ the procedure and time period for filing objections. See FRBP 2002(c)(1).

If all of the nonexempt property of the estate has an aggregate gross value of less than \$2500, the trustee does not have to prepare a separate notice of sale. Instead, the trustee may rely on the general notice of intent to sell such property which is included in the "Notice of Commencement of Case Under the Bankruptcy Code, Meeting of Creditors, and Fixing of Dates" (Official Form 9) mailed by the Clerk of Court to all creditors and parties-in-interest. See FRBP 6004(d).

B. Obtain court authority for the employment of an auctioneer.

A trustee may employ an auctioneer to conduct an auction sale of estate property "on any reasonable terms and conditions of employment." 11 U.S.C. §328(a). Employment of an auctioneer must be authorized by the court. 11 U.S.C. §327. In order to be eligible for

employment, an auctioneer must be a “disinterested person” as that term is defined by 11 U.S.C. §101(14), and must not have any interests adverse to those of the estate. An auctioneer must be bonded. In addition, under FRBP 6005, a court order authorizing the employment of an auctioneer must fix the amount or rate of the auctioneer’s compensation. The application to employ an auctioneer must be filed with the Court and served on the United States Trustee. The application should, at a minimum, contain the following information:

- 1). The name, address and qualifications of the proposed auctioneer;
- 2). A statement whether the auctioneer is on the United States Trustee’s List of Bonded Auctioneers, and if not, a statement describing the arrangements made concerning bonding for the auctioneer;
- 3). An estimate of the probable range of anticipated auction proceeds, as well as an estimate of the expenses which will be incurred by the auctioneer in connection with the sale;
- 4). A statement describing the proposed compensation of the auctioneer, including whether such compensation includes any surcharge or buyer’s premium. A "buyer's premium" is usually a fixed percentage of the sales price which is collected from a successful bidder in addition to the amount of the successful bid. The premium is used to compensate the auctioneer. Recovery of both a standard commission and a buyer’s premium in the same case will not generally be allowed. Court rulings following the initial promulgation of these guidelines in 1999 have approved such practices as the following:
 - a.) The auctioneer may collect and retain a buyer’s premium and seek Court approval to recover actual and necessary expenses from the estate.
 - b.) The auctioneer may collect a buyer’s premium, include the premium in the total amount of funds turned over to the trustee, and then request Court approval for a commission based on this total plus reimbursement of actual and necessary expenses.

Regardless of the arrangement requested, full disclosure of all relevant details is required. If a buyer's premium is requested as part of an auctioneer's compensation, the application to employ and order must specifically describe this arrangement. If the auctioneer is going to retain the premium instead of turning it over to the trustee, the order authorizing the employment of the auctioneer must specifically authorize this procedure. Any and all other fees must be described.

- 5). A statement whether the auctioneer maintains insurance to cover lost, stolen or damaged property; and
- 6). An affidavit executed by the auctioneer conforming to the requirements of

FRBP 2014(a).

C. Insure that the proposed auctioneer is bonded.

Auctioneers are entrusted with estate property, and as a result, they must be bonded. The United States Trustee for Region 6 has established a blanket bond for auctioneers which is underwritten by International Sureties, Ltd. Auctioneers who subscribe to the blanket bond are placed on a list which is available from the United States Trustee's office. An auctioneer can be added to this bond by contacting International Sureties at (504)-581-6404.

The United States Trustee does not recommend or endorse any particular auctioneer for employment. If a trustee wants to hire an auctioneer who is not covered under the blanket bond (for example, for an out-of-state sale), the trustee must contact the United States Trustee's office in advance of the filing of an application to employ to arrange bonding for the proposed auctioneer.

PART II - CONDUCTING AUCTION SALES

The chapter 7 trustee is responsible for ensuring that auction sales are conducted in accordance with the law and with these guidelines. Trustees should monitor the performance of their auctioneers by periodically attending auctions, carefully reviewing all reports of sale and other sale documentation, and independently verifying reported information to the extent practicable. The trustee must insure that estate property is protected against loss, that property is sold for reasonable prices to independent buyers, and that auction proceeds are promptly remitted. The trustee should also insure that the auctioneer is promptly paid after fees and expenses have been approved by the court.

It is a federal crime (18 U.S.C. §154) for a trustee to directly or indirectly purchase property of an estate for which the trustee serves. This criminal statute is also applicable to auctioneers as officers of the Court. Therefore, auctioneers or officers, directors, stockholders, agents or employees of an auctioneer should not purchase, directly or indirectly, or have a financial interest in the purchase of, any property of an estate which the auctioneer has been employed to sell. In addition to these criminal penalties, the United States Trustee for Region 6 has established a policy prohibiting trustees on his panel from purchasing assets of any chapter 7 bankruptcy estates administered in the Northern and Eastern Districts of Texas.

Trustees should make sure that auctioneers, at minimum, follow these procedures in

conducting auction sales:

- 1). Auctioneers should keep records of all transactions involving estate property;
- 2). Sale should be by public outcry, with the terms of sale announced before bids are taken;
- 3). Records of all expenses incurred as a part of the auction sale must be kept and produced upon request;
- 4). Sales should be conducted after reasonable public advertising, and a reasonable opportunity for inspection of the property offered for sale.

PART III - REPORT OF SALE

After a sale has taken place, it is critical that a complete accounting be rendered to the trustee, the court and the United States Trustee. After a sale the auctioneer must remit the **gross** proceeds of the sale (less any buyer's premium, if previously authorized by the court) to the trustee within ten (10) days of receipt. The trustee should make arrangements for the disposition of property which did not sell.

Within thirty (30) days of the conclusion of an auction sale the trustee must file a Report of Sale with the United States Trustee and the court. The trustee must be sure to obtain the information necessary to prepare the report from the auctioneer in a timely manner. At minimum, a Report of Sale must contain the following information:

- 1). The date, time and location of the sale;
- 2). A marked inventory of the property sold, showing the name and address of the purchaser of each lot and the prices paid; (if bidder numbers are used, the report must also include the bidders' identities);
- 3). An inventory of any property which did not sell; or which was otherwise removed from sale due to reclamation, loss, damage or other cause;
- 4). An itemized list of all expenses;
- 5). If a buyer's premium or surcharge has been authorized, an accounting for all surcharge funds collected by the auctioneer;
- 6). A statement describing the advertising done in connection with the sale (or copies of the ads);
- 7). The amount of the gross proceeds received from the sale **and** the date(s) on which such proceeds were turned over to the trustee.

PART IV - PAYMENT OF AUCTIONEERS

The trustee should file a timely and detailed motion to pay auctioneer's commission and expenses conforming to the requirements of 11 U.S.C. § 330, FRBP 2016(a), Local Bankruptcy Rule 2002.1(a)(7), and the United States Trustee Guidelines for Reviewing Applications for compensation and Reimbursement of Expenses Filed under 11 U.S.C. § 330.

The trustee must comply with Local Bankruptcy Rules 9007.1 and 9014.1 regarding notice of the motion to pay. The trustee should file a notice containing the twenty-day "negative notice" language in Local Bankruptcy Rule 9007.1 and include a certificate of service on all parties in interest. Twenty-three days after service of the motion and notice, the trustee should file a "certificate of no objection" pursuant to Local Bankruptcy Rule 9007.1(d) and upload an order for the Court's signature.

In addition, the trustee should insure that a timely and detailed application for approval of the auctioneer's commission and expenses is filed with the court, and served on the United States Trustee. See FRBP 2016. The United States Trustee will generally not object to the payment of a commission which does not exceed the following guidelines:

For sales of personal property: 10% of the first \$50,000;
5% of amounts between \$50,001 and \$100,000;
3% of all amounts in excess of \$100,000.

For sales of real property: 6%

These figures are guidelines only, and applicants may request compensation exceeding these limits should they believe the circumstances warrant. The applicant would, of course, have the burden of establishing the reasonableness of the request.

In all instances, the commission is to be calculated on the gross proceeds of the whole auction sale, and may not be calculated on separate transactions which are a part of the larger sale. For example, if an auction is held for several vehicles belonging to an estate, the commission is calculated on the aggregate proceeds of all the vehicles sold, and not on the proceeds of each separate vehicle sale.

Reimbursement of reasonable and necessary expenses may be authorized by the court. The United States Trustee will generally not object to requests for reimbursement of actual expenses (not estimates) for taking inventory, cleaning, setting up, cataloguing, advertising, moving, storage and other direct costs associated with an auction sale, as long as such costs are reasonable and are completely documented. Labor costs must be broken down into hourly rates and hours spent. The names and addresses of contract laborers should be

supplied to the trustee and submitted with the application for compensation. Auctioneers should not request reimbursement for the costs of an auctioneer and/or ringmen. These costs should be covered by the commission.

PART V - INTERNET AUCTIONS

A trustee may employ Internet auction services. Such sales must be noticed and/or approved using the same criteria as live auctions. The applications to employ and to compensate an Internet auction site must similarly be approved by the Court. A report of sale must also be filed with the Court; although, it will likely be prepared and filed by the trustee rather than the auctioneer. No bond is required of an Internet auction site if the trustee retains the asset sold until valid payment is received from the buyer.