

TRUSTEE'S SALES – BIDDERS BEWARE

A trustee's sale of real property is a "public" auction, though frequently the only parties in attendance are the trustee and the beneficiary on whose behalf the trustee is conducting the sale. The beneficiary will make a "credit bid," which is generally the entire amount owed to the beneficiary (or less at the beneficiary's election) by the defaulting party (trustor) together with statutory fees and costs.

The beneficiary need not bid the full credit bid and frequently does not do so if the beneficiary wishes to encourage other parties to bid. If the beneficiary discounts his credit bid sufficiently or if the trust property has value in excess of the credit bid and there are no liens senior to the deed of trust which is to be foreclosed, the property may be very attractive to potential bidders as a perceived "bargain." The beneficiary may make successive credit bids in addition to its initial credit bid.

While bidders may, in fact, acquire a bargain property, they are foregoing the warranties, title insurance, and feasibility reviews available for "normal" transactions. Following are some examples.

1. Trustee's deeds are generally without representation or warranty. Therefore, the successful bidder is taking subject to title defects, environmental liability and other matters without recourse to any other party in the chain of title. In many cases, the trustee will allow the bidder to review the Trustee Sale Guaranty ("TSG") in advance of the sale and the bidder should take that opportunity. Certain title companies who issue TSGs will allow the successful bidder a credit against an owner's title policy for the amount of the TSG, if that company issued the original report to the trustee. Review of the TSG will provide a list of all matters (and encumbrances, such as other liens or mortgages) of record against the property.

2. The notice of trustee's sale will provide the legal description, street address (if available) and tax parcel number of the property being sold. DO NOT ASSUME ANYTHING without verifying that the legal description properly describes what you think you are bidding on. You may assume you are bidding on a 10 acre parcel that is in fact a 5 acre parcel. You may assume you are bidding on one condominium unit when in fact you end up buying a different one. You may assume from the street address that you are getting something other than what is described in the legal description. If your assumptions are incorrect, you bear the risk. For the most part there is no "Oops, I didn't get what I thought I was buying, I want my money back" defense in the trustee's sale context.

3. The trustee's sale statutes require the trustee to collect a ten thousand dollar (\$10,000) deposit prior to the bidding from every prospective bidder other than the beneficiary, in any form satisfactory to the trustee. This deposit is forfeited if the prospective bidder is the winning bidder at the sale and fails to pay the remaining purchase price by the close of business on the following day. A defaulting bidder may also be liable for other damages by statute.

4. Prospective bidders should provide their names, addresses and telephone numbers to the trustee prior to the commencement of bidding. If the trustee must continue the sale for any reason, the trustee must provide all registered bidders with a notice of the date of sale continuation.

5. The bidder should ask the trustee to prepare and record the deed immediately after the sale. If the trustor files bankruptcy after the sale occurs, but before the deed is recorded, the bidder may incur unnecessary expense in proving that he or she is entitled to freely deal with the property.

6. The bidder should be aware that the trustor may cure the default and reinstate the deed of trust at any time before the close of business on the last business day before the trustee's sale. In addition, the beneficiary may direct the trustee to allow the trustor additional time to reinstate by postponing the sale.

7. The bidder should determine whether the foreclosure will also give the bidder title to the personal property, if any, located on the premises. Frequently, beneficiaries will direct the trustee to foreclose on their personal property security interests as part of the trustee's sale. This is permitted under the Arizona Uniform Commercial Code.

8. In reviewing the TSG, the bidder should be aware of federal tax liens which may be recorded against the trustor's interest in the property. Where the bidder has acquired the property through trustee's sale foreclosure of a lien senior to the tax lien, the Internal Revenue Service has the right to redeem the property for one hundred twenty (120) days after the trustee's sale for a statutorily determined price, which is generally based on the bid price at the sale. In addition, the bidder should determine whether the trustee or beneficiary has notified the Internal Revenue Service of the sale date at least twenty-five (25) days before the scheduled sale. If they have failed to do so, the tax lien may remain of record against the property.