

Insights

Key Considerations When Buying a Winning Foreclosure Bid

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This article is the sixth and final installment in a multi-part series based on the Lowndes white paper, "Selling & Acquiring Distressed Real Estate in Florida." Each installment has examined key legal and strategic considerations for acquiring distressed assets in the state.

If you are considering purchasing a winning foreclosure bid from a lender in order to acquire foreclosed property, it is important to be aware of potential issues and to negotiate key considerations in the contract, whether it is signed before or after the foreclosure sale. Careful planning can help protect your investment and ensure a smooth transition of ownership.

A contract may be signed with a lender before the foreclosure sale, when the lender holds either the loan documents or the Final Judgment of Foreclosure, but since the sale has not occurred the lender has not bid on the property. This scenario occurs when the lender and the buyer anticipate that the lender will successfully bid at the foreclosure sale. The closing should be contingent on the foreclosure sale actually taking place and the lender being the successful bidder.

The buyer should negotiate for the lender to credit bid up to the full amount of its Final Judgment to increase the likelihood of winning. However, lenders are often unwilling to contractually commit to bidding more than the purchase price being paid by the buyer, especially when that price is significantly lower than the Judgment amount. If another bidder offers more than the contract price at the foreclosure sale, the lender will want to stop bidding and allow the third party to acquire the property. This ensures that the lender receives a higher recovery than what was contemplated in the contract.

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Since there is no winning bid at the time the contract is signed, a prudent buyer should ensure that the contract addresses the same issues and due diligence concerns that apply when purchasing loan documents or a Final Judgment, discussed at length in another article here.

Foreclosure sales can be delayed or overturned if someone files an objection within ten days after the sale, which is evidenced by the Clerk of Court's issuance of a Certificate of Sale. If no objections are filed within that period, the Clerk then issues the Certificate of Title to the winning bidder, typically within 24 hours after the Certificate of Sale.

The contract should clearly address timing and contingencies related to the assignment of the winning bid. The buyer will want to include provisions addressing the following:

- A right to terminate the contract and obtain a refund of any earnest money deposit if the lender is unsuccessful in acquiring the winning bid or an objection to the sale is filed;
- Under what circumstances the lender can terminate the contract (for example, if it is outbid at the sale);
- Whether the lender is obligated to defend against objections to the sale and thereby delay the closing, and if so for how long; and
- The timing for the buyer's purchase of the bid, which will be within the narrow window between the foreclosure sale date and the date on which the Certificate of Sale is issued. Note that when a winning bid is assigned, the buyer will not be automatically substituted as the plaintiff in the foreclosure action, but may need Court approval to recognize the assignment and issue the Certificate of Title (assuming that was not arranged in advance).

Purchasing a winning foreclosure bid presents unique challenges and procedural hurdles. By anticipating potential issues, such as addressing objections, competing bidders, and court procedures, and addressing them clearly in the contract, a buyer can better manage risk and improve its chances of a successful closing.

A more detailed discussion of the issues presented by this article, and the nuances associated with this subject, are contained in a longer article on the Lowndes website at this link.

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