



Using the auction process to maximize value in a 1031 exchange.

October 27, 2008 - Front Section

Consequentially, investors ask on an increasing basis whether they may perform a Â§1031 exchange when utilizing the auction process to sell property. The answer is that both forward and reverse Â§1031 exchanges may be performed where property is sold via auction provided that the exchange is properly structured in advance of the auction. If, in fact, an investor is in the process of performing a reverse exchange and has completed the acquisition of the replacement property but not yet sold the relinquished property, using an auction to sell the relinquished property may enable the investor to timely complete his/her exchange within the 180 calendar day "safe harbor" period where otherwise the exchange might fail.

As with all Â§1031 delayed exchanges, where the relinquished property is sold before the replacement property is purchased, the investor must satisfy all of the requirements under Â§1031 to perform an exchange. He or she must still satisfy the requirement that the property has been "held for investment or for use in a trade or business." In addition, exchange documents must be prepared and executed prior to the sale of the property reflecting that an exchange is to be performed. Finally, the contract of sale must permit its assignment to the qualified intermediary prior to closing or the sale of the property and then subsequently must be assigned. A qualified intermediary should be engaged to provide guidance as to the above issues and to make sure that the exchange documents are properly drafted. The qualified intermediary should be apprised in advance of the particular requirements of the auctioneer conducting the auction and the terms of the contract of sale to be used by the auctioneer. Careful advance planning and consultations with a qualified intermediary and one's legal and tax advisors is critical to the success of the exchange.

Once the exchange is structured, the auction may proceed in the same manner as it would if an exchange was not being performed. In fact, there is no need for bidders to be made aware of the fact that the seller may be performing a Â§1031 exchange during the bidding process.

In summary, the auction process provides investors with a way to ensure that maximum value is obtained through the structured process detailed above while simultaneously accommodating the requirements of a Â§1031 exchange. Thus, by realizing the highest possible sales price, on ownership's terms, while minimizing carrying costs and deferring taxes, investors can truly maximize value by implementing an auction in conjunction with a Â§1031 exchange.

Pamela Michaels, Esq. is an attorney and vice president at Asset Preservation,â€Inc., Manhattan, N.Y. Misha Haghani is an attorney and the director of Sheldon Good & Co. Auctions Northeast, LLC, New York, N.Y.