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Environmental Due Diligence Guide

REPORT

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An Insider's Perspective

Asarco Deal Highlights Benefits of Liability Transfer Strategy

The business of purchasing contaminated real estate and assuming the related environmental liability from a third party is a ''robust undertaking,'' and years of experience in the cost-efficient cleanup and redevelopment of contaminated sites proved critical for the company that ultimately prevailed in the bidding contest for a New Jersey property owned by bankrupt mining giant Asarco, that company's chief executive officer told BNA August 5.

Randall Jostes, president and CEO of Environmental Liability Transfer Inc. (ELT), said although ELT came to the table late in the game, ultimately the bankruptcy judge ''was looking for the best transaction that would work for creditors and allow the debtor to emerge successfully'' and approved ELT's offer to purchase the real estate and assume the liability for the 70-acre site in September 2009.

The liability transfer for the site was part of what has been described as the most complex environmental bankruptcy in history (18 EDDG 75, 10/15/09).

Mechanics of the Transfer

''What is most attractive about a liability transfer involving ELT is that when we work with a client, we contract to take all environmental liability, including the known and unknown liability both onsite and offsite as well as past, present, and future liabilities. ELT's offering can include the assumption of natural resource damage claims and third-party bodily injury or property damage claims,'' Jostes said.

Concerning the Asarco transaction, ELT is ''100 percent on the hook'' for liabilities related to onsite contamination but is excluded from any offsite and NRD-related liabilities, Jostes said.

In figuring out how to structure the deal, Jostes explained, ELT looked at the $15.2 million in liability the debtor had estimated for the site. ''ELT assessed the liability at $5 million,'' he explained. Because of ELT's experience working with regulators and meeting protective cleanup levels, ELT was confident its remedial design team had engineered solutions that would allow it to conduct the cleanup very cost-efficiently, Jostes explained.

In addition, he said, ''we thought the real estate was worth a lot more than the other bidder,'' calculating its worth in excess of $10 million in ''as is'' condition and much more if clean. As such, ''ELT was able to make a positive value purchase offer of $5.1 million for the site, which represented $3 million more than the initial bid made to the court.'' After reviewing the offer, the judge gave a 60-day extension, Jostes said.

Satisfying the Regulator

At that point, ELT had to satisfy the New Jersey Department of Environmental Protection and convince the regulator that ELT possessed the financial and technical capability to assume the liability and ensure the cleanup, with the end goal of entering into a consent agreement with the state.

Initially, Jostes said, ''NJDEP was skeptical of the differential between the cleanup estimates of $15 million and $5 million.''

''ELT remains hopeful it can complete the remediation for $5 million but gave financial assurance for $8 million to allow the deal to go forward,'' Jostes explained. ''This positioned ELT as the responsible party and allowed Asarco a settlement agreement permanently releasing it from liabilities at the site.'' Financial assurance monies now are in trust and New Jersey is the trust beneficiary.

The deal worked because NJDEP, a very sophisticated party with a primary goal of protecting their state, also was a creditor in the bankruptcy proceeding, Jostes said. ''If the liabilities were addressed through the traditional bankruptcy process in court, New Jersey ran the risk of being underfunded.''

When the court approved the transaction, it required an insurance policy as a condition of sale, as had been promised by the original bidder, Jostes explained. However, the insurance firm representing the original bidder had to recuse itself

from the deal, and ''in an amazingly quick turnaround Zurich provided a $12.8 million cost-cap policy'' for the site.

Liability Transfer Drivers

Jostes, who now has been involved in liability transfer deals with an estimated $700 million in liability abated, identified two primary drivers for corporations to use liability transfers. First, he said, are merger and acquisition transactions where Company A is acquiring Company B but does not want B's legacy liability, and B does not want to exclude sites from the transaction and deal with them in perpetuity. The second primary driver is bankruptcy.

''Through the bankruptcy process, parties look at how to best deal with debts and liabilities and emerge successfully. This is an opportune time to arrange for environmental liabilities to be discharged. To do so, companies in bankruptcy need to put environmentally impaired real estate into a trust and into the hands of a company that can satisfy all regulatory requirements,'' Jostes explained.

This was precisely what happened with the Asarco deal. Asarco needed a company to assign value to real estate and step into its shoes for legacy liability, and ELT was able to do both.

At the end of the day, the cleanup is fully funded, Jostes said. First Environment, a New Jersey firm, is in charge of remediation. Commercial Development Company, an affiliate of ELT, is setting forth plans for redeveloping the site, which most likely will be slated for big box distribution use, Jostes said. In the meantime, ELT is looking to acquire adjacent properties in the area.

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