

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE:

AUXILIUS HEAVY INDUSTRIES, LLC

Debtor.

Case No. 20-1963-JMC-11

**MOTION TO SELL ASSETS AT PUBLIC AUCTION
PURSUANT TO BANKRUPTCY CODE SECTION 363(b) FREE AND CLEAR OF INTERESTS, LIENS,
CLAIMS AND ENCUMBRANCES AND TO DISTRIBUTE PROCEEDS IN ACCORDANCE WITH
PRIORITY OF LIENS AND TO APPROVE BID PROCEDURES**

Auxilius Heavy Industries, LLC (the “Debtor”), by counsel, pursuant to Sections 105, and 363, of Title 11 of the United States Code (the “Bankruptcy Code”), Federal Rules of Bankruptcy Procedure 2002 and 6004, and S.D. Ind. B-6004-1(a), requests an Order authorizing the sale at auction of substantially all of its assets (the “Assets”), free and clear of any interests, liens, claims and encumbrances with the sale proceeds to be distributed in accordance with priority of liens, and to approve bid procedures on the following grounds:

Jurisdiction and Venue

1. The Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on March 26, 2020, (“Petition Date”). Since the Petition Date, the Debtor has been operating its estate as debtor-in-possession pursuant to Bankruptcy Code Sections 1107 and 1108.
2. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. Sections 157 and 1334. Venue is proper in this district pursuant to 28 U.S.C. Section 1408. This matter is core within the meaning of 28 U.S.C. Sections 157(b)(2)(A), (N) and (O).

Background

3. The Debtor is a limited liability company which was organized under the laws of the State of Indiana. The Debtor is the owner and operator of the business that leverages the Assets in its capacity as a wind turbine maintenance company. Purdue Employees Federal Credit Union (“Pefcu”) held the first and best perfected security interest in the Assets on the Petition Date. On April 17, 2020 the Court approved the Debtor’s Motion for Authority to Obtain Secured Post Petition Financing on an interim basis, and thereafter approved such financing on a final basis on May 11, 2020. By its financing Orders, the Court granted the DIP lender, Clark Industries, LLC, a first and best security interest in the Assets ahead of Pefcu.

As a result of such financing, the Debtor has generated cash and accounts receivable well in excess of the DIP lender's claim so that Pefcu remains fully secured in its subordinated security position. Besides these claims, the Debtor is not aware of any other party who claims a security interest in the Assets.

4. Debtor does not believe it can successfully reorganize but it does believe there is a wide market for the Assets that will generate a substantial return for creditors. As a result, Debtor believes that an orderly liquidation of the Assets will benefit both the Debtor and the bankruptcy estate.

5. The Debtor filed its Application to Employ Financial Advisor which was granted by the Court on July 20, 2020, authorizing the Debtor to employ Ken Wolff of Richey, Mills & Associates, LLP, (the "Financial Advisor"). The Financial Advisor's role in this matter is to assist the Debtor in marketing the Assets, and to advise on obtaining and presenting the highest and best bid for the Assets to the Court. The Financial Advisor has prepared a sale book that documents the pertinent information a willing buyer will review to make a bid on the Assets. The Financial Advisor believes that there is a robust market for the Assets and has had contact with close to a dozen such buyers as part of its effort to sell. Based on the level of demand the Financial Advisor has encountered for the Assets, the Debtor believes it is appropriate to advance this Motion and the sale procedure it contemplates without employing a breakup fee mechanism as part of a stalking horse bid. The bid procedures reflect this conclusion.

6. The Debtor will accept offers to buy the Assets by sealed bid auction with bids to be accepted until October 12, 2020 with bids to be sent to the Financial Advisor's office located at 3815 River Crossing Pkwy. Suite 170, Indianapolis, IN 46240. The auction may be converted to a live open outcry auction in the discretion of the Financial Advisor. In the event that the auction is converted to a live open outcry auction, the auction date shall be set by the Order approving the Debtor's Motion to Establish Bid Procedures being filed at the same time as this Motion. The auction will be conducted pursuant to the bid procedures identified in the Motion to Establish Bid Procedures.

RELIEF REQUESTED

7. By this Motion, the Debtor seeks the entry of an order:
- (a) authorizing the Debtor to sell the Assets at auction, outside the ordinary course of business, pursuant to Bankruptcy Code Section 363(b);
 - (b) authorizing the Debtor to sell the Assets free and clear of liens, claims, encumbrances, and interests pursuant to Bankruptcy Code Section 363(f) with liens to attach to the proceeds of sale subject to the approval of the winning bid by the Court;

- (c) determining that the purchaser is a good faith purchaser pursuant to Bankruptcy Code Section 363(m);
- (d) waiving the 14 day waiting period under Bankruptcy Rule 6004(h);
- (e) ordering the proceeds of sale to be distributed in accordance with the priority of liens as determined by the Court;
- (f) approving the Bid Procedures governing the process by which third parties may submit competitive bids to purchase the Assets, by which the competitive bids shall be evaluated, and by which the auction will be conducted.
- (g) granting all other just and proper relief.

BASIS FOR RELIEF REQUESTED

8. Section 363(b)(1) of the Bankruptcy Code provides, in relevant part, that a debtor in possession, “after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. Section 363(b)(1). Although the Bankruptcy Code does not articulate the standard for approving a sale of assets (other than requiring notice and a hearing), a debtor’s sale or use of assets outside the ordinary course of business should be approved if the debtor can demonstrate a sound business justification for the proposed transaction. See *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143 (3d Cir. 1986); see also *Myers v. Martin (In re Martin)*, 91 F.3d 389, 395 (3d Cir. 1996); *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983); *Dai-Ichi Kangyo Bank, Ltd v. Montgomery Ward Holding Corp., (In re Montgomery Ward Holding Corp.)*, 242 B.R. 147, 153 (D. Del. 1999). Pursuant to Bankruptcy Rule 6004, “[a]ll sales not in the ordinary course of business may be by private sale or by public auction.” Fed. R. Bankr. P. 6004(f)(1).

9. The Debtor submits that sound business justification exists to sell the Assets at this time and in the manner proposed. The Assets are expected to bring substantially more than the secured debt owing to Pefcu and the DIP Lender, thus allowing for a distribution to general unsecured creditors, likely via a liquidating plan in the case. While the Debtor has operated at a profit post petition, there is no guarantee that can will persist or that continuing to operate would enable the Debtor to make a meaningful payment to creditors.

10. Under Section 363(f) of the Bankruptcy Code, a debtor-in-possession may sell all or any part of its property free and clear of any and all liens, claims or interests in such property if: (i) such a sale is permitted under applicable non-bankruptcy law; (ii) the party asserting such a lien, claim or interest consents to such sale; (iii) the interest is a lien and the purchase price for the property is greater than the

aggregate amount of all liens on the property; (iv) the interest is the subject of a bona fide dispute; or (v) the party asserting the lien, claim or interest could be compelled, in a legal or equitable proceeding, to accept a money satisfaction for such interest. 11 U.S.C. Section 363(f); *Citicorp Homeowners Serv., Inc. v. Elliot (In re Elliot)*, 94 B.R. 343, 345 (E.D. Pa. 1988) (noting that § 363(f) of the Bankruptcy Code is written in the disjunctive; therefore, a court may approve a sale “free and clear” provided at least one of the subsections is met).

11. Selling the Assets free and clear of liens is permissible under Bankruptcy Code Sections 363(f)(2) and (5). While the Debtor has not confirmed it, presumably both the DIP Lender and Pefcu consent to this sale provided they receives\ the proceeds of sale in accordance with the priority of their liens, after payment of any cost of sale allowed by the Court. Either creditor shall be allowed to credit bid in the sale. Either lender “could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.” 11 U.S.C. Section 363(f)(5); see, *In re P.K.R. Convalescent Centers, Inc.*, 189 B.R. 90 (Bankr. E.D. Va. 1995) (allowing the sale of nursing home assets under Section 363(f)(5) over objection where interest was reducible to a claim and subject to a hypothetical money satisfaction). In this Chapter 11 case, the Debtor could exercise the cram-down rights under Section 1129(b)(2) to compel the lenders to accept a money satisfaction of their interest. This is considered a legal proceeding that could compel the lenders to accept a money satisfaction of it interest. See *In re Terrace Chalet Apartments, Ltd.*, 159 B.R. 821, 829 (Bankr. N.D. Ill. 1993) (finding that Section 1129(b)(2) cram down is legal proceeding that could compel a creditor to accept a money satisfaction under Section 363(f)(5)). Accordingly, the Assets may be sold free and clear of liens, claims, encumbrances, or interests.

12. Section 363(m) of the Bankruptcy Code provides, in pertinent part:

The reversal or modification on appeal of an authorization under subsection (b) . . . of this section of a sale . . . of property does not affect the validity of a sale . . . under such authorization to an entity that purchased . . . such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale . . . were stayed pending appeal.

11 U.S.C. § 363(m).

13. Section 363(m) of the Bankruptcy Code thus protects the purchaser of assets sold pursuant to section 363 of the Bankruptcy Code from the risk that it will lose its interest in the purchased assets if the order allowing the sale is reversed on appeal. By its terms, section 363(m) of the Bankruptcy Code applies to sales of interests in tangible assets, which are included in the Assets.

14. As the proposed public auction represents an arm's-length transaction in which the buyer will act in good faith, without collusion or fraud of any kind, the Debtor requests that the Court make the finding at the hearing on this Motion that the highest bidder shall be deemed a good faith purchaser entitled to the protections of Bankruptcy Code Section 363(m).

15. The Debtor hereby requests that the Court waive the 14 day stay period under Bankruptcy Rules 6004(h). Bankruptcy Rule 6004(h) provides that an "order authorizing the use, sale, or lease of property . . . is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise." The Debtor requests that the Sale Order be effective immediately by providing that the 14 day stay under Bankruptcy Rules 6004(h) is waived so that the sale can close promptly.

16. The purpose of Bankruptcy Rule 6004(h) is to provide sufficient time for an objecting party to appeal before an order can be implemented. See Advisory Committee Notes to Fed. R. Bankr. P. 6004(h). Although Bankruptcy Rule 6004(h) and the Advisory Committee Notes are silent as to when a court should "order otherwise" and eliminate or reduce the fourteen (14) day stay period, Collier on Bankruptcy suggests that the stay period should be eliminated to allow a sale or other transaction to close immediately "where there has been no objection to the procedure." 10 Collier on Bankruptcy 15th Ed. Rev., ¶6064.09 (L. King, 15th rev. ed. 1988). Furthermore, Collier's provides that if an objection is filed and overruled, and the objecting party informs the court of its intent to appeal, the stay may be reduced to the amount of time actually necessary to file such appeal. *Id.*

17. The Debtor's business is seasonal and will slow down dramatically before winter. As the price buyers are willing to pay for the Assets is a function of the income generated by their use, the optimum timing for the sale is before that happens. Accordingly, time is of the essence.

18. By separate motion the Debtor is seeking to include its assignable executory contracts, including the lease for its primary operating premises, to the Purchaser in the sale.

19. The Bid Procedures are attached hereto as Exhibit "A". The Debtor respectfully requests the Court enter an Order approving the terms of the Auction Services Addendum in its entirety.

20. The Debtor further seeks approval of the following material terms:

a. **Eligibility of Bidders.** In order to be eligible to bid or otherwise participate in the Auction, each bidder must be determined, in the sole discretion of the Financial Advisor and Debtor, to be a qualified Bidder. Until such time the DIP Lender is paid in full, the Financial Advisor and the Debtor shall consult with the DIP Lender as to which Bidders constitute as qualifying Bidders; provided however, the Financial Advisor and the Debtor shall have the sole right to determine whether a bidder is a qualifying Bidder. The DIP Lender shall be considered a qualifying Bidder, entitled to participate in the Auction;

provided however, the DIP Lender shall still be required to submit a sealed bid by the Sealed Bid Deadline. Neither Seller nor Financial Advisor, nor their respective employees, are permitted to bid at the Auction.

b. **Initial Earnest Money Deposit.** As part of the registration process, Bidders need not post an initial bidding registration deposit, but bids must be accompanied by payment of the Initial Earnest Money Deposit in the amount of ten (10.0%) of the Bidder's initial sealed bid amount, to be paid by cashier's check or certified check made payable to: Auxilius Heavy Industries, LLC, c/o KC Cohen, Lawyer, PC, Trust Account; provided however, the DIP Lender shall not be required to submit an Initial Earnest Money Deposit, to the extent the DIP loan remains outstanding at the time of submission of the bid. The Initial Earnest Money Deposit shall be refunded as provided below in the event the Bidder's bid is not accepted. Bidders will also be required to provide satisfactory proof of readily available funds up to the amount of the Bidder's bid and any increased bid amount at the Auction. The Initial Earnest Money Deposit will be refundable except as otherwise provided in these Terms and Conditions.

c. **Bidder Term Sheet.** A Bidder's sealed bid must be accompanied by a term sheet that describes all pertinent terms and conditions of the sale, including but not limited to, any contingencies; provided however, in order to be a qualified bid, a bid cannot be subject to any due diligence or inspections.

d. **Representations and Warranties.** A Bidder's sealed bid must include a statement from the bidder that: (i) the Bidder is not an insider of the Debtor; (ii) the proposed sale represents an arms-length transaction between the parties, made without fraud or collusion with any other person (including any other prospective Bidder); and (iii) there has been no attempt to take any unfair advantage of the Debtor such that the Bidder may be deemed to be purchasing the Assets in good faith pursuant to 11 U.S.C. § 363(m); provided however, a Bidder who may be deemed an insider of the Debtor shall not necessarily be disqualified from bidding or deemed not to be a good faith purchaser pursuant to 11 U.S.C. § 363(m).

e. **Rights of DIP Lender and Pefcu.** The winning bid shall be subject to the approval of the DIP Lender, Pefcu and any of their successors and assigns, but only to the extent the proposed sale does not satisfy the claims of either lender in full. **The Debtor and Financial Advisor agree that, pursuant to 11 U.S.C. § 363(k), the DIP Lender and Pefcu, and any of their successors or assigns have an absolute right to credit bid up to the amount they are owed by Debtor and may make its credit bid (including any combination of a credit bid and a cash bid) at any time prior to the acceptance of the winning bid.**

f. **Assets Inspection.** The Assets will be available for physical inspection for you, your contractors, consultants, engineers, architects and agents on a specific date or dates at specific times established by agreement with the Financial Advisor. During the inspection, a representative of Financial Advisor will be available, either personally or by phone, to address any questions about the Assets or the sale process. **Bidders will be required to acknowledge that they have inspected the Assets prior to the Auction by signing a Bidder's Statement prior to commencement of the Auction.** No other access upon or invasive testing of the Assets will be permitted without Seller's express prior written consent in its sole discretion and Seller may in any event condition its willingness to grant any such consent on Bidder's execution and delivery of an Access and Indemnity Agreement in form and substance acceptable to Seller.

g. **Sealed Bid.** Sealed bids submitted by Bidders must be submitted by October 12, 2020 (the "**Sealed Bid Deadline**"). Each Bidder must submit the Initial Earnest Money Deposit with the signed Business Asset Sale Agreement. The High Bidder will further be required to deposit additional funds (the "**Additional Earnest Money**"), so that the Initial Earnest Money Deposit, together with the Additional Earnest Money, will be equal to ten percent (10%) of the Total Purchase Price, within three (3) business days after Seller's acceptance of the Purchase and Sale Agreement (any Initial Earnest Money Deposit, together with the Additional Earnest Money, is herein referred to collectively as the "**Earnest Money Deposit**"); provided however, the DIP Lender shall only be required to submit an Earnest Money Deposit to the extent such Earnest Money Deposit exceeds the total amount owed by the Debtor to the DIP Lender. All Earnest Money Deposits shall be held in trust by counsel to the Seller or the title company.

h. Bids must conform to the form of Business Asset Sale Agreement available in the Data Locker in order to be considered a conforming bid. Any modifications to the Business Asset Sale Agreement must be submitted for approval not later than six (6) business days prior to the Sealed Bid Deadline. Seller will respond to such modifications not later than three (3) business days prior to the Sealed Bid Deadline. If accepted by Seller, the Business Asset Sale Agreement, as so modified, shall be deemed a conforming bid for that Bidder.

i. All sealed bids shall be irrevocable for ten business days (the “**Irrevocable Period**”) commencing the day after the Sealed Bid Deadline. The Seller, during the Irrevocable Period, may analyze the bids and determine the High Bidder. If the Seller fails to respond to a Bidder during the Irrevocable Period, such Bidder’s bid shall become revocable. During the Irrevocable Period, Seller will negotiate only with qualified Bidders who submitted sealed bids, and the Seller may, at the Seller’s sole option: (i) accept any bid even if it is not for the highest Total Purchase Price; (ii) reject any and/or all bids; (iii) call for highest and best bids; (iv) deliver a counter-offer to any bid or other offer; or (v) convert the sealed bid auction to an open outcry auction. The High Bidder’s Earnest Money Deposit shall be held in trust by counsel to the Seller pending closing. Each Bidder whose bid is not accepted by Seller in accordance with the foregoing may request that the Initial Earnest Money Deposit be returned once the Irrevocable Period has expired.

j. **Sealed Bid Acceptance Criteria:** Bids will be considered for acceptance by the following criteria: (i) highest Total Purchase Price; (ii) proof of Bidder’s financial wherewithal and ability to close; and (iii) earliest closing date.

k. **Conversion of Auction; Sale of Assets; Live Open Outcry Auction:** At the sole discretion of the Financial Advisor, and with the input of the Debtor, the auction may be converted to a live open outcry auction, to be conducted on October 26, 2020.

BASIS FOR RELIEF REQUESTED AS TO BID PROCEDURES

21. Bankruptcy Rules 2002 and 6004 govern the scope of the notice to be provided when a debtor opts to sell property of the estate under Section 363 of the Bankruptcy Code. With respect to the procedures to be adopted in conducting Section 363 sale, however, Bankruptcy Rule 6004 provides only that such sale may be by private sale or public auction.

22. Neither the Bankruptcy Code nor the Bankruptcy Rules contain specific provisions with respect to the procedures to be employed by a debtor in conducting a public or private sale. Generally, to obtain approval of a proposed sale, the debtor must demonstrate that the proffered purchase price is the highest and best offer. *In re Integrated Resources, Inc.*, 135 B.R. 746, 750 (Bankr. S.D.N.Y. 1992).

23. Courts have long recognized the need for competitive bidding at hearings on private sales; “[c]ompetitive bidding yields higher offers and thus benefits the estate. Therefore, the objective is ‘to maximize bidding, not restrict it.’” *In re Atlanta Packaging Products, Inc.*, 99 B.R. 124, 131 (Bankr. N.D. Ga. 1988). The Court has broad discretion with regard to ordering bidding procedures on a sale of estate property. *In re Big Rivers Elec. Corp.*, 213 B.R. 962 (Bankr. W.D. Ky. 1997). In this case, the Financial Advisor intends to aggressively market the auction in an effort to obtain the best and highest possible price.

The Debtor, therefore, submits that the Bid Procedures are reasonable, are designed to maximize the value of the Assets, and should be approved.

24. The Court should not “cherry-pick” among contractual provisions, objecting to select individual portions, if the agreement as a whole is supported by the business judgment of the parties. *Cf. In re Ames Dep’t Stores, Inc., Eastern Retailers Service Corp., et. al.*, 115 B.R. 34, 37-38 (Bankr. S.D.N.Y. 1990). As a result, the Bid Procedures should be approved in their entirety.

25. The Debtor believes that the sale process will result in the highest price for the Assets.

Notice

26. A copy of this Motion will be provided to the following: (a) the Office of the United States Trustee; (b) those creditors holding the 20 largest unsecured claims against the Debtor; (c) counsel to the DIP Lender and Pefcu; (d) all other secured creditors of records; and (e) all owners of the Debtor, including counsel for Kathy Parker who formally held an ownership interest in the Debtor.

WHEREFORE, the Debtor respectfully requests that this Court enter an order approving this motion as requested herein and granting all other just and proper relief.

AUXILIUS HEAVY INDUSTRIES, LLC

By: /s/ KC Cohen

KC Cohen, Attorney for the Debtor

KC Cohen, Lawyer, PC

151 N. Delaware St., Ste. 1106

Indianapolis, IN 46204

Phone: 317-715-1845

kc@esoft-legal.com

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a copy of the foregoing was filed using the Court's ECF system and parties will be served via such system. In addition, copies of the foregoing were delivered email to the following on September 15, 2020:

kc@esoft-legal.com;

mkidwell@auxheavyindustries.com;

mparker@auxheavyindustries.com;

cmendoza@auxheavyindustries.com;

kishida@ftccc.net;

jwc@stuartlaw.com;

SMV@stuartlaw.com;

Laura.Duvall@usdoj.gov;

leslie@lesliecohenlaw.com;

jim@rubin-levin.net;

mtheisen@rubin-levin.net;

dcaruso@rubin-levin.net;

ben.caughey@merchocaughey.com;

ustpregion10.in.ecf@usdoj.gov;

and by regular US Mail to the following 20 largest unsecured creditors:

Amex Blue for Business(AHI)
PO Box 650448
Dallas, TX 75265-0448

Amex Personal
PO Box 650448
Dallas, TX 75265-0448

Atlas Copco Tools and Assembly Systems L
4428 Underwood Rd
La Porte, TX 77571

Axiom Medical Consulting
8401 New Trails Drive, Ste 100
The Woodlands, TX 77381

Bank of America
PO Box 982234
El Paso, TX 79998-2234

Chase Business (AHI)
PO Box 6294
Carol Stream, IL 60197-6294

Chase Personal
PO Box 6294
Carol Stream, IL 60197-6294

Composites One
4526 Paysphere Circle
Chicago, IL 60674

Dononvan, LLC
5114 Scott St
Torrance, CA 90503

Enterprise Leasing Company
PO Box 840173
Kansas City, MO 64184-0173

GME Supply
1391 E Boone Industrial Blvd
Columbia, MO 65202

Grainger
1819 W 16th St
Indianapolis, IN 46202-2032

HYTORC DIVISION UNEX
333 Route 17 North
Mahwah, NJ 07430

Indiana Dept of Revenue
PO Box 1028
Indianapolis, IN 46206-1028

Internal Revenue Service
POB 2116
Philadelphia, PA 19114-0326

James C Pietsch
33 Glenoaks Blvd, Ste 204
Glendale, CA 91207

Kathy Parker Dean
1663 Mullet Ct
Naples, FL 34102

Marie Elizabeth Cera Celso
33 Glenoaks Blvd, Ste 204
Glendale, CA 91207

Spider (Safeworks)
4341 Security Parkway, Ste 103
New Albany, IN 47150-9374

Wind Access Engineering, Inc
309 Highland Ave
Theresa, WI 53091

_____/s/ KC Cohen ____
KC Cohen