
SO ORDERED,



Judge Selene D. Maddox

United States Bankruptcy Judge

The Order of the Court is set forth below. The case docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI

IN RE: EXPRESS GRAIN TERMINALS,
LLC¹

CASE NO.: 21-11832-SDM

DEBTOR

CHAPTER 11

**ORDER APPROVING BIDDING PROCEDURES AND GRANTING OTHER RELATED
RELIEF**

This case came before the Court on the *Motion, Pursuant to Bankruptcy Code Sections 105(A), 363, 365, 503 and 507, Bankruptcy Rules 2002, 3007, 6004, 6006, 9007 and 9014 for Entry of (I) Order Approving Bidding Procedures and Stalking Horse in Connection with Sales of Assets of Debtor, (II) Approving Form and Manner of Notice, (III) Scheduling Auction and Sale Hearing and (IV) Granting Related Relief* (the “Bid Procedures Motion”) (Dkt. #1688) filed by the Debtor, Express Grain Terminals, LLC (“Express Grain” or the “Debtor”), *Objections* to the Bid Procedures Motion filed by the Bank of Commerce and First South Farm Credit, ACA (the “Objecting Production Lenders”) (Dkt. #1726), and Farm Groups II and III (Dkt. #1751), *Limited*

¹ The above styled case is being jointly administered with *In re Express Biodiesel, LLC*, Case No. 21-11834-SDM and *In re Express Processing, LLC*, Case No. 21-11835-SDM.

Objections filed by Guaranty Bank & Trust Company (“Guaranty Bank”) (Dkt. #1741), the Farm Group (Dkt. #1744), UMB Bank, N.A. (“UMB”) (Dkt. #1749), and Macquarie Commodities (USA) Inc. and Macquarie Bank Limited (“Macquarie”) (Dkt. #1750), and *Joinder to Objections* filed by Farm Group I (Dkt. #1747) (collectively, with the Farm Group and Farm Groups II and III above, the “Farm Groups”). The Court conducted a telephonic hearing on the Bidding Procedures Motion on January 25, 2022. At the conclusion of the hearing, the Court informed the parties that it would give a status update on January 26, 2022. After the final cash collateral hearing on January 26, 2022, the Court took several matters under advisement, including the Bid Procedures Motion. The Court is now prepared to rule.

The Court will briefly summarize the parties’ positions. In its Bid Procedures Motion, Express Grain argues that its Chief Restructuring Officer (the “CRO”), Dennis Gerrard (“Gerrard”), has determined that the bankruptcy estate, the Debtor, and all Creditors will benefit if Express Grain seeks a buyer or buyers for all of its assets in this bankruptcy case and the other administratively consolidated bankruptcy cases. The CRO, in his business judgment, posits that Express Grain does not have the “internal capital structure” to propose a meaningful, “internal” plan of reorganization at this point in the bankruptcy case. In other words, the CRO argues that the Debtor does not have the means or ability to borrow additional capital, either to replace existing secured debt or obtain working capital. Based on that lack of capital structure, the Debtor avers that a feasible plan of reorganization is not possible at this stage in the bankruptcy case. As evidenced by the CRO’s testimony at the hearing, Express Grain has received interest from multiple purchasers for some or all of the Debtor’s assets, but none of these potential purchasers have put forward a definite offer. Because no potential purchaser has proposed a concrete offer,

Express Grain argues that the Court should approve the requested bid procedures to facilitate a sale and/or auction.

The Objecting Production Lenders argue that the Bid Procedures Motion is merely a ploy to satisfy this Court's requirement for Express Grain to file an "action plan" for how it will operate if the Debtor uses the entirety of pre and postpetition grain in its manufacturing operation.² Further, the Objecting Production Lenders state that the Bid Procedures Motion is not specific enough, in that it: (1) fails to "draw adequate interest" and provide guidance to both potential bidders and Creditors; and (2) lacks key requirements including a good faith deposit amount, the form of an asset purchase agreement required, articulation of assets to be sold, and dates such as a bid deadlines, sale hearing date, auction date, and closing deadline. The Objecting Production Lenders also argue that the Debtor's bid procedures generally fail to address credit bidding and whether credit bidding parties must qualify to bid by any bid deadlines. Finally, the Objecting Production Lenders complain that the determination of qualified bidders is left to the CRO's discretion³ and

² In its sixth interim cash collateral order (Dkt. #1648), the Court required Express Grain to produce an "action plan" as described above. Express Grain, instead, proposed two scenarios to winddown its operation in the "EGT Winddown Plan", of which the Court approved "Scenario 2" as outlined in its final order authorizing the use of cash collateral (Dkt. #1787). The Court notes that Express Grain technically did not comply with the "action plan" requirement, as the Court intended the Debtor to provide a basis for continued operations should the pre or postpetition grain be depleted. Nevertheless, it is clear to the Court that the CRO believes, in his business judgment, that the lack of an internal capital structure makes it almost impossible to secure working capital to purchase grain elsewhere for the Debtor to continue its manufacturing operation once the pre and postpetition grain is depleted.

³ The Objecting Production Lenders also make note that the CRO is working with a "tainted board" to make critical decisions in the bidding process. The Court notes that it addressed this argument in its Memorandum Opinion and Order (Dkt. #1767) as it related to the appointment of a chapter 11 trustee and again in its bench ruling issued on February 10, 2022. The CRO has ultimate operational authority and does not serve at the pleasure of Express Grain's board of directors. There has also been no evidence presented or findings by this Court that CR3 Partners,

that the marketing process to date has been largely a mystery with insufficient report and explanations as to efforts taken to market assets of the bankruptcy estate.⁴

Farm Groups II and III similarly argue that the Bid Procedures Motion is not specific or fails to seek specific relief. They argue that while the Bid Procedures Motion “references” generic bidding requirements, those requirements do not set appropriate deadlines considering the time constraints of this bankruptcy case. Farm Groups II and III also argue that based on their pending motion to convert to a chapter 7 (heard by the Court on February 7, 2022), if this bankruptcy case is converted or a chapter 11 trustee is appointed, either trustee will replace the CRO and be vested with the authority to advance the sale of Express Grain’s assets.⁵ As a result, Farm Groups II and III asked the Court to delay any ruling on the Bid Procedures Motion.

As to the remainder of the limited objections, Guaranty Bank argues that Express Grain’s proposed bidding procedures requires qualified bidders to submit bids in the form of an asset purchase agreement that is “marked up to reflect any revisions” that the qualified bidder has made to the model asset purchase agreement, but the Bid Procedures Motion does not even include a copy of the model asset purchase agreement. The Farm Group points out that the proposed bidding procedures give qualified bidders the ability to propose which executory contracts and unexpired

LLC (“CR3”) or the CRO are “tainted” by previous actions or inactions on the part of the board of directors.

⁴ The Court agrees with the Objecting Production Lenders that the marketing process has been largely unknown to many parties, including the Court. The Court sought to remedy this in its final order authorizing the use of cash collateral (Dkt. #1787) where the Court imposed additional reporting requirements on the Debtor as it relates to “PrePetition Interest Holders” on the day-to-day operations and marketing and sale information.

⁵ The Court issued its bench ruling on February 10, 2022 denying both the *Motion to Convert to Chapter 7 or, in the Alternative, Appoint a Chapter 11 Trustee* (Dkt. #1725) and the *Amended Joint Motion* (Dkt. #1768). Therefore, this argument is now moot.

leases the bidder proposed to have Express Grain assume and assign, and the Court should not allow any qualified bidder to determine what executory contracts and unexpired leases they propose to purchase until orders are entered by the Court on the acceptance or rejection of those contracts and leases.

UMB raises several issues (some already addressed above) with the proposed bidding procedures⁶, including: (1) the procedures should be modified to include consultation rights for UMB and other parties; (2) the procedures fail to address the allocation of the proposed purchase price and should provide an allocation schedule to include real property, equipment, inventory, and receivables; (3) the procedures do not recognize UMB's credit-bid rights; (4) the procedures should automatically make UMB a qualified bidder; (5) the procedures fail to specify timing for the proposed deadlines, auction, and sale closing; (6) the procedures fail to attach an asset purchase agreement. Finally, Macquarie would like the Court to require that all qualified bids seeking to purchase prepetition soybeans (or any inventory emanating from those soybeans), allocate "cash consideration in an amount no less than the amount necessary to pay for . . . any remaining prepetition soybeans purchased plus . . . the cost of the prepetition soybeans used to generate any inventory purchased . . . in each case at the interim established price. . . ."

At the hearing, Express Grain conceded that certain details of any potential sale are not included in the Bid Procedures Motion. According to the Debtor, those omissions were intentional because many of the timing and deadlines are left "up to the Court". Express Grain addressed some

⁶ UMB calls the Bid Procedures Motion a "sale motion" in its limited objection. As explained by counsel for the Debtor at the hearing, the Bid Procedures Motion is not the "sale motion", which a debtor typically files after court approval of any bidding procedures in the Northern District of Mississippi.

of the other issues raised in the objections and joinders, and the Court has considered those statements relating to a “stalking horse” bidder, the CRO’s discretion to designate “qualified bidders”, what assets may or will be sold, title opinion and title assurance commitment, sale deposits, allocation of purchase price to specific assets, credit bidders, and biodiesel tax credit(s). After considering the parties’ positions, all evidence presented, and the entire record in this proceeding to date, hereby finds and orders as follows:

1. The Court has jurisdiction over this matter pursuant to herein and the parties hereto pursuant to 28 U.S.C. §§ 157 and 1334, 11 U.S.C. §§ 105, 363, 365, 503, 507, and 1107, related statutes, related rules and various orders of reference. This is a core proceeding pursuant to 28 U.S.C. § 157(b).

2. For the debtor-in-possession to satisfy its fiduciary duty to the debtor, creditors and equity holders, there must be some articulated business justification for using, selling, or leasing the property outside the ordinary course of business. *In re Continental Air Lines, Inc.*, 780 F.2d 1223, 1226 (5th Cir. 1986) (internal citations omitted). Courts have made clear that a debtor’s business judgment is entitled to substantial deference with respect to the procedures to be used in selling assets from the estate. *In re ASARCO, LLC*, 650 F.3d. 593, 601 (5th Cir. 2011) (stating that the business judgment standard in § 363 is “flexible and encourages discretion”).

3. Based on the applicable standard, the Court finds the Debtor has shown good and sufficient business reasons for the relief requested in the Bid Procedures Motion and has exercised prudent and reasonable business judgment.

4. The Sale Procedures will establish sound parameters by which the proffered sale

price of the assets may be tested at the Auction, as well as the ensuing Sale Hearing, and evaluated as described herein. Such procedures will increase the likelihood that the Debtor will receive the greatest possible consideration for the assets in a sale because they will ensure a competitive and fair bidding process. The Sale Procedures also allow the Debtor to undertake the Auction process expeditiously, which the Debtor believes is essential to maintaining and maximizing the value of the assets.

5. The Auction and Sale Procedures will promote active bidding from seriously interested parties and will dispel any doubt as to the best or otherwise highest offer reasonably available at this time for the purchase of the assets. Moreover, the Sale Procedures will allow the Debtor to conduct the Auction in a controlled, fair, and open fashion that will encourage participation by financially capable bidders who demonstrate the ability to close a transaction. The Sale Procedures will encourage bidding for the assets, are consistent with other procedures previously approved by this Court, and are appropriate under the relevant standards governing auction proceedings and bidding incentives in bankruptcy proceedings. See, e.g., *In re O'Brien Env'tl. Energy*, 181 F.3d 527, 537 (3d Cir. 1999).

6. The sale of Debtor's assets is in the best interest of the Debtor's estate and its Creditors.

7. The Bidding Procedures set forth in this Order are hereby approved for the sale of the assets of the Debtor, and the Debtor is hereby authorized to proceed with the sales process for sale of its assets subject to the exclusion of certain assets as set forth below.

8. The net sales proceeds from the sale of the assets of the Debtor shall be deposited in a segregated account and held pending further order of this Court.

9. The Debtor shall keep its lenders, StoneX Commodity Solutions, LLC (“StoneX”), UMB, Macquarie, counsel for the various Farm Groups and the agricultural production lenders informed of, and shall provide parallel insight and input into, developments regarding all elements of the bidding and sale process, including without limitation being notified of entities that express interest in purchasing the assets and any bids that are received, as well as an express right to object to unqualified bids.

10. The Debtor, by and through counsel, shall immediately file its Motion to Sell (“Sale Motion”) and shall attach the form Asset Purchase Agreement (the “APA”) for use in the bidding procedures.

11. Nothing contained in this Bid Procedures Order shall be deemed to deprive any party of the right to timely object to the Sale Motion, all of which rights are expressly reserved.

12. A copy of this Bid Procedures Order, the Sale Motion, the Bid Deadline, the dates and times of the Auction and the Sale Hearing and the Objection Deadline shall be provided to and served on all Creditors having entered an appearance, all secured Creditors, to include all potential interest holders having filed an interest notice or those Creditors relying on the § 557 Grain Report. The Debtor shall be allowed to effectuate service on those interest holders represented by counsel by serving counsel of record, the 20 Largest Unsecured Creditors, the United States Trustee (the “UST”) and all entities known to have expressed an interest in purchasing the Debtor’s assets.

13. **SALE PROCEDURES-GENERAL PROVISIONS⁷:**

⁷ Any provisions discussed at the hearing on the Bid Procedures Motion not included in this Bid Procedures Order (such as more detailed information on credit bidding, title opinion and

Sale Free and Clear of Liens: Pursuant to these Sale and Bidding Procedures and 11 U.S.C. § 363, the Debtor's Assets shall be sold free and clear of all liens, claims, rights, interests, and encumbrances, with all such liens, claims, rights, interests, and encumbrances to attach to the proceeds of the sale of the Assets with the same validity and priority as such liens, claims, rights, interests, and encumbrances applied against the Assets. Nothing in this Bid Procedures Order shall affect any substantive rights of any interest holders under the § 557 procedures as outlined in the *Order Establishing Procedures* (Dkt. #1070) and the *Amended Section 557 Procedures – Phase 2 Scheduling Order* (Dkt. #1800).

No Warranty: The Debtor's Assets shall be sold without warranty or representation of any kind or nature and are being purchased by the Successful Bidder "as is – where is" and "with all faults" and without representations or warranties of any kind or nature.

Self Reliance: Each bidder shall be deemed to acknowledge and represent that it has had an opportunity to inspect and examine the Assets and conduct any and all due diligence regarding the Assets prior to making its offer(s), that it has relied solely upon its own independent review, investigation and/or inspection of any document(s) and/or the Assets (the "Due Diligence" as set forth in paragraph A(ii) below) in making its bid(s) and that it did not rely upon or receive any written or oral statements, representations, promises, warranties or guarantees whatsoever, whether express, implied, by operation of law, or otherwise, with respect to the Assets, or the completeness of any information provided in connection with the Assets or the Auction, except as expressly stated in these Bidding Procedures.

Excluded From Sale: The Assets to be sold do not include:

- Debtor's cash, whether cash in hand or funds on deposit in Debtor's numerous bank accounts existing as of the Petition Date and those established in connection with this bankruptcy case;
- Debtor's security deposits;
- Debtor's accounts receivables;
- Debtor's grain inventory or finished product unless an offer or bid is made specifying the dollar amount allocated to the grain inventory and/or to the finished product inventory;
- Any avoidance actions arising under chapter 5 of title 11 of the United States Code or state law;
- Any Executory Contracts and Unexpired Leases;

title insurance commitment costs, and asset allocation to purchase price details) should be included in any Sale Motion. Specifically, regarding purchase price allocation to specific assets, the Debtor should include in its Sale Motion its own designation or allocation of purchase price to assets that would be non-binding on purchasers.

- Any claims or causes of action against the Debtor's management, owners, directors or officers, including any insurance proceeds related to those claims or causes of action⁸; nor,
- Any biodiesel tax credit(s).

Credit Bidding: To the extent a Creditor holding an allowed secured claim, secured by a valid perfected lien on Assets being sold, is entitled to credit bid under 11 U.S.C. § 363(k), said secured Creditor shall be permitted to credit bid and shall be subject to the Sale and Bid Procedures.

A. Bid Procedures

- (i) Qualified Bidders. The Debtor shall seek to identify and recognize a number of bidders as qualified to bid on the assets, based on, among other things, statements of interest and certain financial information demonstrating to the Debtor's satisfaction the bidders' financial wherewithal to consummate a purchase of the assets (each, a "Qualified Bidder"). The Debtor shall notify all Qualified Bidders in writing of their designation as Qualified Bidders and their ability to participate in the bidding process. Any party interested in purchasing the assets may seek to become a Qualified Bidder and participate in the bidding process by notifying the Debtor and its counsel prior to the Bid Deadline (as such term is defined below) of its interest in bidding on the assets and providing such information as may be required by the Debtor to demonstrate such potential bidder's financial wherewithal to consummate a purchase of the assets and assume operations as the Debtor immediately upon closing the transaction(s), and by submitting a Good Faith Deposit (as such term is defined below). The Debtor may determine which additional parties constitute Qualified Bidders. All Qualified Bidders and all such Bidders at the Auction shall be deemed to have consented to the case jurisdiction of the Bankruptcy Court to enter orders which shall be binding in all respects.

⁸ Although there appears to be no Director and Officer insurance coverage currently in effect or in effect at the time of the bankruptcy filings based on Gerrard's testimony at the hearing on the *Amended Application to Approve Interim and Final Employment of CR3 Partners, LLC to (I) Provide a Chief Restructuring Officer and Additional Personnel; and (II) Designate Dennis Gerrard as the Chief Restructuring Officer* filed by Express Grain (Dkt. #1154).

- (ii) Due Diligence. The Debtor will afford any potential Qualified Bidder such due diligence access or additional information as may be reasonably requested by the prospective Qualified Bidder and that, in its business judgment, the Debtor determines to be reasonable and appropriate, subject to the Qualified Bidder's execution of an appropriate confidentiality agreement covering such diligence materials and information. The Debtor will coordinate all reasonable requests for additional information and due diligence access from prospective Qualified Bidders with Qualified Bidders' requests being treated as a higher priority than prospective Qualified Bidders. Unless otherwise determined by the Debtor, in its discretion, the availability of additional due diligence to a prospective Qualified Bidder will cease from and after the Bid Deadline (as such term is defined below). The Debtor shall, in good faith, attempt to resolve any dispute arising from a decision of the Debtor to exclude any requested due diligence information, and any unresolved disputes shall be presented to the Court for resolution.
- (iii) Non-Qualified Bidders. Any potential bidder that is not designated as a Qualified Bidder in accordance with the foregoing shall be disqualified from further participation in the bidding process ("Non-Qualified Bidder"). A Non-Qualified Bidder will be permitted to conduct initial due diligence, only until the Court approves the Bid Procedures Motion, but not be permitted to conduct extensive due diligence, and will not be able to make a bid for the assets under the Sale Procedures or participate in the Auction (as such term is defined below).
- (iv) Asset Purchase Agreement. All Qualified Bidders must submit to the Debtor, the CRO, and Debtor's counsel, an asset purchase agreement that is "marked up" to reflect any revisions that the Qualified Bidder has made to the APA for the submission of Qualified Bids (the "Competing APA"). The offer shall:
- (a) provide that the bidder offers to purchase the assets upon terms stated in the offer;
 - (b) clearly delineate all components of the proposed purchase price;

- (c) provide that the bidder's offer is irrevocable upon acceptance by the Debtor at the Auction;
 - (d) disclose the relationship, if any, between the bidder and the Debtor and its insiders or affiliates.
 - (e) provide that the bidder's offer is subject to no, or minimal, due diligence contingencies, and if any contingencies, that they be removed by the Bid Deadline, and is not subject to board approval or financing contingency; and
 - (f) not contain any other material conditions to closing.
- (v) Bid Deadline. Bids must be submitted on or before February 24, 2022 at 5:00 p.m. central standard time (the "Bid Deadline"). A Qualified Bidder that desires to make a bid shall submit via electronic mail, U.S. Mail, facsimile or other delivery service, written copies of its bid to the following:

Debtor's Chief Restructuring Officer:

Mr. Dennis Gerrard
c/o Express Grain Terminals, LLC
808 12th Street
Greenwood, MS 38930
Email: dennis.gerrard@cr3partners.com

Counsel for the Debtor:

Craig M. Geno, Esq.
Law Offices of Craig M. Geno, PLLC 587 Highland
Colony Parkway Ridgeland, MS 39157
Fax: 601-427-0050
Email: cmgeno@cmgenolaw.com

B. Bid Requirements

- (i) Assets. While it is the intention of the Debtor to sell its Assets together as opposed to any piecemeal sale process, the Debtor will entertain any final written offers for less than all the Debtor's Assets pursuant to the Bidding Process. Therefore, Qualified Bidders may make a bid for all the assets or some

subset of the assets, and Debtor reserves the right, in its discretion, to consider any bids for less than all of the assets.

- (ii) Form and Content of Bid. A Qualified Bidder must submit its bid in a signed Competing APA. The bid shall contain the terms and conditions, and amount, of the offer being submitted by the bidder.
- (iii) Required Supporting Materials. A Qualified Bidder shall also furnish with its offer (a) written evidence of available cash or a commitment for financing or other confirmable fiscal ability to consummate the transaction and such other evidence of ability to consummate the transaction as the Debtor may reasonably request evidencing adequate assurance of future performance and (b) a copy of a board resolution or similar document demonstrating the authority of the Qualified Bidder to make a binding and irrevocable bid on the terms proposed in the Competing APA. No offer subject to any due diligence or financing contingencies will be considered.
- (iv) Required Good Faith Deposit. By the Bid Deadline, a Qualified Bidder must deposit with the Debtor's counsel a "Good Faith Deposit" in the following amounts⁹:
 - Substantially all of Debtor's Assets Offered For Sale: \$150,000.00
 - Debtor's Sidon Facility Assets: \$50,000.00
 - Debtor's Minter City Facility Assets: \$25,000.00
 - Debtor's Greenwood Facility Assets: \$75,000.00.

(v) Bid Lots.

The Debtor may offer the assets for sale in their totality, or in such lots as determined by the CRO.

(vi) Qualified Bid. Subject to the terms of Section B(vii) below, a

⁹ The Good Faith Deposit must be made by a certified check or wire transfer and will be held by the Debtor's counsel of record in his escrow account or in an interest bearing account at a banking institution approved by the Office of the U.S. Trustee subject to the remaining provisions of this Bid Procedures Order.

bid received by the Bid Deadline from a Qualified Bidder that meets the requirements in Sections B(i)-(iv) is considered a “Qualified Bid”. The Debtor reserves the right to waive material noncompliance with any one or more of these requirements and deem any otherwise non-qualifying bid to be a Qualified Bid. A Qualified Bid will be evaluated based upon factors such as: (a) the amount of the Qualified Bid; (b) the fair, net value to be provided to the Debtor under the Qualified Bid; (c) the ability to close or the likelihood of closing the proposed sale transaction without delay; and (d) any other factors that the Debtor may deem relevant.

- (vii) Rejection of Bid. Notwithstanding the above, the Debtor shall be entitled to reject any Qualified Bid, in its discretion, if the Qualified Bid¹⁰:
- (a) is on terms that are materially more burdensome or conditional than the terms of the APA;
 - (b) requires any indemnification of such Qualified Bidder;
 - (c) is not received by the Bid Deadline;
 - (d) requires any regulatory or other approval that would unreasonably delay the closing;
 - (e) does not satisfy Section B of the Sale Procedures;
 - (f) contains any material conditions to closing; or
 - (g) any other factors that the Debtor may deem relevant and/or not in the best interest of the Debtor’s estate.

C. Auction Process

- (i) Bid Negotiations. Upon the receipt of Qualified Bids, the Debtor/CRO may negotiate with one or more Qualified Bidders regarding the terms of the applicable Qualified Bids.
- (ii) Auction. An auction for the sale of the assets (the “Auction”)

¹⁰ Any bid rejected pursuant to this Section B(vii) shall not be deemed to be a Qualified Bid.

will commence at 10:00 a.m. on February 25, 2022 at the U. S. Bankruptcy Court, Northern District of Mississippi, Cochran U.S. Bankruptcy Courthouse, 703 Highway 145 North, Aberdeen, MS 39730.

- (a) Qualified Participants. Unless otherwise ordered by the Bankruptcy Court for cause shown, only a Qualified Bidder that has been notified that it has submitted a Qualified Bid is eligible to participate in the Auction. The Debtor shall conduct the Auction consistent with the Sale Procedures and in a manner to maximize the consideration provided for the assets.
- (b) Bidding Process. For all Lots and Selection of Successful Bidder. At the commencement of the Auction, the CRO will announce the current highest and best bid(s) that has been received from a Qualified Bidder(s) (the "Opening Bid"). After the Opening Bid, the CRO will then offer the assets of the Debtor, in their totality, for sale. In the event a bid(s) is received for the Debtor's assets in their entirety, the CRO shall ask for competing bids that are higher than the existing bid by at least \$50,000, with subsequent bidding increments of not less than \$25,000 greater than that of the then-highest or otherwise best Qualified Bid. During the Auction, the CRO, in his discretion may authorize different bid increments. At the conclusion of the bidding for the totality of the assets, the CRO may offer the assets in separate lots, by location. At the conclusion of the bidding for the assets by lots, the CRO will announce the bidder(s) (the "Successful Bidder"), if any, that has submitted the Qualified Bid(s), if any, which, in the CRO's reasonable judgment, represents the highest or otherwise best offer(s) and is in the best interest of the Debtor, its estate and its creditors (the "Successful Bid"), and thereupon proceed to the Sale Hearing.
- (c) Factors Considered. The Debtor will consider a number of factors in selecting the Successful Bidder or Bidders, including, without limitation, (i) aggregate purchase price, (ii) composition of consideration, (iii)

closing conditions, (iv) closing timeline/closing costs, and (v) commitment to community, employees and capital investment.

- (d) Debtor's Discretion. Except as specifically provided in Sections (a), (b) and (c) of this subsection, the Debtor/CRO, in its discretion, may conduct the Auction in any manner deemed reasonably prudent to obtain the highest or otherwise best result for the estate.

D. Sale Hearing

- (i) Approval of Sale. A hearing with respect to the forthcoming Motion to Sell (the "Sale Hearing") will take place at the Bankruptcy Court on February 25, 2022 at 1:30 p.m. and, if necessary, continuing thereafter. The deadline for any party in interest to file any objections to the Motion to Sell shall be on a date to be set by the Court, (the "Objection Deadline"). If any Successful Bidder is selected by the Debtor, the Debtor, in its discretion, will seek the entry of a final order from the Bankruptcy Court at the Sale Hearing approving and authorizing the proposed sale to the Successful Bidder on the terms and conditions substantially consistent with and in accordance with these Sale Procedures. The Debtor will also seek to have the bid (the "Back-up Bid") of the second-highest bidder (the "Back-up Bidder") approved in the event the Successful Bidder is unable or unwilling to close.

E. Application/Return of Good Faith Deposit

- (i) Return to Unsuccessful Bidders Excluding Back-up Bidder. The Good Faith Deposit, together with all interest accrued thereon, if any, shall be returned to any bidder whose bid was not the Successful Bid or the Back-up Bid within five (5) business days after the conclusion of the Sale Hearing.
- (ii) Application on Behalf of Successful Bidder and Application on Behalf of or Return to Back-up Bidder. The Good Faith Deposit submitted by the Successful Bidder shall be applied against the payment of the purchase price at the closing of the sale to the Successful Bidder. Likewise, upon closing, the Back-up Bidder's Good Faith Deposit will be returned unless the

Successful Bidder is unable to close at which point the Successful Bidder's Good Faith Deposit will be forfeited to the Debtor and the Back-up Bidder will become the Successful Bidder, and the Back-up Bidder's Good Faith Deposit shall be applied to the purchase price for the Back-up Bid. The Debtor reserves all its rights regarding any return of the Good Faith Deposit and failure to timely return any Deposit shall not serve as a claim for breach of any bid or create any default in favor of any Bidder.

F. Retention of Necessary Books and Records

- (i) Upon completion of any Court-approved Sale, the Debtor will maintain copies of the Debtor's books and records that the Debtor determines are necessary to complete the administration of its bankruptcy case. In addition, any Successful Bidder will be asked and required to cooperate with the Debtor in good faith in the event that the Debtor needs any other records after the Closing that are in the possession of the Successful Bidder.

Subject to any limitations and conditions as described in this Bid Procedures Order, the *Motion, Pursuant to Bankruptcy Code Sections 105(A), 363, 365, 503 and 507, Bankruptcy Rules 2002, 3007, 6004, 6006, 9007 and 9014 for Entry of (I) Order Approving Bidding Procedures and Stalking Horse in Connection with Sales of Assets of Debtor, (II) Approving Form and Manner of Notice, (III) Scheduling Auction and Sale Hearing and (IV) Granting Related Relief (Dkt. #1688)* is **GRANTED IN PART**.

##END OF ORDER##