

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

U.S. SECURITIES AND EXCHANGE
COMMISSION,

Civil Action No. 18-cv-5587

Plaintiff,

Hon. John Z. Lee

v.

Magistrate Judge Young B. Kim

EQUITYBUILD, INC.,
EQUITYBUILD FINANCE, LLC,
JEROME H. COHEN, and
SHAUN D. COHEN, Defendants.

**MOTION OF LIBERTY EBCP, LLC RELATED TO CREDIT
BID PROCEDURES AND OBJECTION TO 24 HOUR CREDIT BID DEADLINE**

Liberty EBCP, LLC (“Liberty”), by its counsel, Jaffe, Raitt, Heuer & Weiss, P.C. files this *Motion of Liberty EBCP, LLC Related to Credit Bid Procedures and Objection to 24 Hour Credit Bid Deadline* (“Motion”), and in support thereof, states as follows:

On August 14, 2019, Liberty received notice from the Receiver’s real estate agent of the highest bids received on six of Liberty’s properties (the “August 14 Properties”), with a demand that Liberty advise of its intent whether to place a credit bid with respect to any of the August 14 Properties by the close of business the following day, August 15, 2019 (the “24 Hour Credit Bid Response Deadline”). Liberty responded to the Receiver and its counsel on August 15, 2019, at approximately 12:58 p.m. Central time with the following email:

Liberty is in receipt of Mr. Baasch’s emails of yesterday regarding 8201 S. Kingston, 7656 S. Kingston, 7546 S. Saginaw, 8326-58 S. Ellis, 7748-50 S. Essex and 7600 S. Kingston (the “August 14 Properties”). No information was provided other than the winning bid amounts. Before making its decision regarding the placement of a credit bid as to the August 14 Properties, Liberty needs the following information:

1. A copy of the winning bidder's Asset Purchase Agreement, as to each of the August 14 Properties. Liberty, if it places a credit bid, needs to know what it is bidding against and it needs to know the terms and conditions of the selected highest offer, in order to evaluate it as a stand-alone bid.
2. The "additional details governing the terms and conditions of credit bids, including a good faith estimate of the Seller's expenses at closing" which, per the bidding procedures "will be made available by the Receiver upon request."
3. When and where was the sale of each of the August 14 Properties published?
4. When and how were each of the August 14 Properties marketed—through what means and portals; were direct contacts made and if so, to who and in what way; were any targeted solicitations made, etc.?
5. When did each of the means and portals for marketing go live or otherwise communicated?
6. How many people visited the due diligence room as to each of the August 14 Properties? How many bidders conducted site visits as to each of the August 14 Properties?
7. What offers were received on each of the August 14 Properties—who were the bidders and in what dollar amounts?
8. How was the highest and best offer determined for each of the August 14 Properties? Did any of the August 14 Properties have a bid in dollar amount higher than the bid accepted? If so, what were the disqualifying terms of the higher offer?
9. What efforts were made, if any, to circle back with other bidders, to top the selected bid? How did that process occur and when? Were all lower bidders given the chance to better their offers, after submission? If not, why not?
10. What relationship, if any, do each of the proposed successful bidders have, if any, to a Receivership Defendant or one of the property management companies.

Liberty objects to a self-created deadline of 24 hours to make its credit bid determination, especially in light of the lack of information provided. Nothing in the bid procedures requires a 24 hour response.

No response was received from the Receiver by the close of business on August 15, 2019.

A response was received on Sunday August 17, 2019, a copy of which is attached hereto as **Exhibit**

A. The response is self-explanatory, but essentially the Receiver has refused to provide any of the requested information, other than the good faith estimate, at a later date.

Liberty should not be subject to the 24-Hour Credit Bid Response Deadline, for the following reasons:

- a. *The 24-Hour Credit Bid Response Deadline is not set forth in the Bid Procedures*

and is completely arbitrary. This Court is well-versed in the Bid Procedures battle between the parties. What is indisputable is that the form of Bid Procedures that Liberty agreed upon with the Receiver (the “Liberty Agreed Bid Procedures”) do not include a 24-Hour Credit Bid Response Deadline. Not a single draft of the Bid Procedures ever addressed the time Liberty would be provided to evaluate and place a credit bid.

b. *The Liberty Agreed Bid Procedures do contain two conditions precedent to the requirement to place a credit bid.* First, Liberty is required to bid against the highest bid received, using a form of purchase agreement required of all bidders, modified as necessary to accommodate the credit bid. Liberty therefore asked for the winning bidder’s asset purchase agreement, so that Liberty can evaluate making a competing credit bid and if necessary, formulate a written offer consistent with the Liberty Agreed Bid Procedures. Per the Liberty Agreed Bid Procedures, the only difference in offers is to be two percent (2%) price increments and modifications necessary to incorporate the concept of a credit bid. This necessarily requires Liberty to fully understand the form of asset purchase agreement needed and against which it is to bid. The successful bidder agreements have not been provided to Liberty.

Second, the Liberty Approved Bid Procedures state that “additional details governing the terms and conditions of credit bids, including a good faith estimate of the Seller’s expenses at closing” which, per the bidding procedures “will be made available by the Receiver upon request.” Liberty has made the request for this information, but has not been provided with it. The costs to be imposed are a material component of understanding what the net proceeds would be to Liberty if it does or does not credit bid.

These two pre-requisites make it clear that a 24 hour credit bid determination was never contemplated by the parties. Therefore, Liberty should not be subject to the 24-Hour Credit Bid Response Deadline.

c. *In evaluating whether to credit bid, Liberty is entitled to the other information requested.* The Receiver's sale process related to the August 14 Properties has been a black box to Liberty and this Court. What Liberty does know is that the total marketing process was not more than four weeks and based on the rigidity of the broker and property managers in permitting Liberty to engage in its site visits, Liberty can only assume that other bidders were met with the same resistance.¹ At face value, Liberty believes that a not more than four week marketing process for commercial real estate properties could not have maximized the properties' exposure to the marketplace. The Receiver believes otherwise, in having recommended the bids received for acceptance.

In evaluating whether to credit bid, it is material to Liberty to understand the amount of bidder interest in each of Liberty's properties. If 20 offers were received, that is different than a single offer having been received, for example, from an insider property manager. If the properties were marketed for one week versus one year, that is a material fact. If the offer Liberty is bidding against has contingencies unknown to Liberty, than it is unable to bid on identical terms, other than as to price. The offer could have seller concessions, other due diligence outs or other conditions unknown to Liberty. The concept of a credit bid is to ensure that a property is not sold for less than fair market value. The extent of market exposure is a material component of a credit

¹ Liberty, based in California, was advised a given property would only be available for inspection on a given date. One of the days was not available to Liberty and the structure would have required Liberty to inspect the properties over a three-day period. Only after repeated email demands by Liberty and a threat to bring the matter to the attention of this Court was the schedule modified to accommodate Liberty's unavailability on the specific Tuesday date.

bid determination. Liberty, therefore, is entitled to know the following information, prior to determining whether to credit bid:

- When and where was the sale of each of the August 14 Properties published?
- When and how were each of the August 14 Properties marketed—through what means and portals; were direct contacts made and if so, to who and in what way; were any targeted solicitations made, etc.?
- When did each of the means and portals for marketing go live or otherwise communicated?
- How many people visited the due diligence room as to each of the August 14 Properties? How many bidders conducted site visits as to each of the August 14 Properties?
- What offers were received on each of the August 14 Properties—who were the bidders and in what dollar amounts?
- How was the highest and best offer determined for each of the August 14 Properties? Did any of the August 14 Properties have a bid in dollar amount higher than the bid accepted? If so, what were the disqualifying terms of the higher offer?
- What efforts were made, if any, to circle back with other bidders, to top the selected bid? How did that process occur and when? Were all lower bidders given the chance to better their offers, after submission? If not, why not?
- What relationship, if any, do each of the proposed successful bidders have, if any, to a Receivership Defendant or one of the property management companies?

Each of the foregoing questions is directly relevant to Liberty's credit bid determination. Even if Liberty does not credit bid, each of the foregoing will be directly relevant to the Court's determination of whether to accept the recommended bids of the Receiver. The goal is to maximize the value of each property sold. To do so, disclosure of this material information is needed by all parties and this Court.

On Exhibit A, the Receiver alleges that Liberty's request for this information was already overruled. This is incorrect. In negotiating the bid procedures, Liberty had requested the opportunity to review the bids and meet and confer with the Receiver **prior** to the winning bids having been selected. As part of its compromise with the Receiver, Liberty did not insist on this prior right to meet and confer. However, Liberty in no way previously asserted or waived its right to review the winning bids, the winning purchase agreements or any of the circumstances related to the solicitation and submission of bids. Liberty knew that the full terms and conditions of each sale would be brought before the Court for approval. What Liberty did not anticipate is that the Receiver would refuse to provide that information, prior to setting a date for the receipt of credit bids. So this issue is ripe for determination by this Court. Quite simply, Liberty should not be required to credit bid without knowing the extent of market exposure to its properties.

Liberty is in no way trying to delay its credit bid determination. To the contrary, it is attempting to expedite it by filing this Motion, only after the Receiver has refused to provide the requested information.

Wherefore, Liberty requests that the 24-Hour Credit Bid Response Deadline, as to Liberty, be extended to a date determined by this Court and only after the foregoing information has been provided to Liberty, or that this Court grant such other relief as the Court deems equitable and just.

Respectfully Submitted,

/s/ Jay L. Welford

Jay L. Welford (P34471)
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Counsel for Liberty EBCP, LLC

Date: August 19, 2019

CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2019, I provided service of the foregoing *Motion of Liberty EBCP, LLC Related to Credit Bid Procedures and Objection to 24 Hour Credit Bid Deadline* via ECF filing to all counsel of record, and via electronic mail or by U.S. mail to the following individuals and entities:

Jerome and Patricia Cohen
1050 8th Avenue N.
Naples, FL 34102
jerryc@reagan.com
Defendant

First Bank
Client Contact Center
600 James S. McDonnell Blvd.
St. Louis, MO 63042

/s/ Jay L. Welford

Jay L. Welford (P34471)
Jaffe, Raitt, Heuer & Weiss, P.C.
27777 Franklin Rd., Ste. 2500
Southfield, MI 48034
(248) 351-3000
jwelford@jaffelaw.com
Counsel for Liberty EBCP, LLC

Re: EquityBuild; process regarding bids

Michael Rachlis <mrachlis@rdaplawn.net>

Sun 8/18/2019 1:09 PM

To: Jay Welford <jwelford@jaffelaw.com>;

Cc: Ellen Duff <eduff@rdaplawn.net>; Jeffrey Baasch <jeffrey.baasch@svn.com>; Alicia Schehr <aschehr@jaffelaw.com>; Eric Novetsky <enovetsky@jaffelaw.com>; Kevin Duff <kduff@rdaplawn.net>;

Jay —

We are in receipt of your e-mail. I note that while one of the ten numbered items (the request for a good faith estimate of costs) was actually part of the agreed procedures, the remainder are far afield. In any event, responses to the items raised are set forth below in red.

Michael

On Aug 16, 2019, at 12:58 PM, Jay Welford <jwelford@jaffelaw.com> wrote:

Liberty is in receipt of Mr. Baasch's emails of yesterday regarding 8201 S. Kingston, 7656 S. Kingston, 7546 S. Saginaw, 8326-58 S. Ellis, 7748-50 S. Essex and 7600 S. Kingston (the "August 14 Properties"). No information was provided other than the winning bid amounts. Before making its decision regarding the placement of a credit bid as to the August 14 Properties, Liberty needs the following information:

1. A copy of the winning bidder's Asset Purchase Agreement, as to each of the August 14 Properties. Liberty, if it places a credit bid, needs to know what it is bidding against and it needs to know the terms and conditions of the selected highest offer, in order to evaluate it as a stand-alone bid.

Your client has been provided the highest bid, exactly as the agreed upon procedures provide. Your client has an opportunity to make a credit bid, if it chooses. Your client is not entitled to see the winning bidder's Asset Purchase Agreement. This is a sealed bid process, and your client has the opportunity to put its credit forward knowing the highest bid.

2. The "additional details governing the terms and conditions of credit bids, including a good faith estimate of the Seller's expenses at closing" which, per the bidding procedures "will be made available by the Receiver upon request."

A good faith estimate of costs will be provided as soon as practicable.

3. When and where was the sale of each of the August 14 Properties published?

This has nothing to do with a credit bid your client is considering. In any event, as we had done previously, we will provide additional information in our motion for approval.

4. When and how were each of the August 14 Properties marketed—through what means and portals; were direct contacts made and if so, to who and in what way; were any targeted solicitations made, etc.?

This has nothing to do with a credit bid your client is considering. In any event, as we had done previously, we will provide additional information in our motion for approval.

5. When did each of the means and portals for marketing go live or otherwise communicated?

This has nothing to do with a credit bid your client is considering. In any event, as we had done previously, we will provide additional information in our motion for approval.

6. How many people visited the due diligence room as to each of the August 14 Properties? How many bidders conducted site visits as to each of the August 14 Properties?

This has nothing to do with a credit bid your client is considering. In any event, as we had done previously, we will provide additional information in our motion for approval.

7. What offers were received on each of the August 14 Properties—who were the bidders and in what dollar amounts?

This has nothing to do with a credit bid your client is considering. In any event, as we had done previously, we will provide additional information in our motion for approval.

8. How was the highest and best offer determined for each of the August 14 Properties? Did any of the August 14 Properties have a bid in dollar amount higher than the bid accepted? If so, what were the disqualifying terms of the higher offer?

This has nothing to do with a credit bid your client is considering. It is the role of the Receiver and his retained professionals to implement the sales process, not yours. Your client has an opportunity to credit bid now based on the bidding that has occurred pursuant to the approved upon procedures.

9. What efforts were made, if any, to circle back with other bidders, to top the selected bid? How did that process occur and when? Were all lower bidders given the chance to better their offers, after submission? If not, why not?

This has nothing to do with a credit bid your client is considering. It is the role of the Receiver and his retained professionals to implement the sales process, not yours. Your client has an opportunity to credit bid now based on the bidding that has occurred pursuant to the approved upon procedures. The Receiver will continue that bidding process consistent with the agreed upon procedures.

10. What relationship, if any, do each of the proposed successful bidders have, if any, to a Receivership Defendant or one of the property management companies.

This has nothing to do with a credit bid your client purportedly is considering. In any event, as we had done previously, we will provide additional information in our motion for approval. If you have a legitimate basis to assertions you plan on making, those can be raised in response to the motion for approval (I note that other objections you raised previously in this regard were overruled).

Liberty objects to a self-created deadline of 24 hours to make its credit bid determination, especially in light of the lack of information provided. Nothing in the bid procedures requires a 24 hour response.

Time is of the essence relative these matters, as you well know. The Receiver will extend the time to receive credit bids from your client until close of business Wednesday.

Jay Welford

jwelford@jaffelaw.com

248.727.1466

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If you received this by mistake, please destroy it and notify us of the error.

From: Ellen Duff <eduff@rdaplawn.net>
Sent: Wednesday, August 14, 2019 6:18 PM
To: Jay Welford <jwelford@jaffelawn.com>
Cc: Alicia Schehr <aschehr@jaffelawn.com>; Eric Novetsky <enovetsky@jaffelawn.com>; Kevin Duff <kduff@rdaplawn.net>; Michael Rachlis <mrachlis@rdaplawn.net>
Subject: RE: EquityBuild; process regarding bids

Jay,

We will be reviewing the bids received tomorrow afternoon, and will follow up with you as soon as we are able to do so.

Regards,
Ellen

--

Ellen Duff
Of Counsel
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Chicago, Illinois 60605
312-275-5107 (Direct)
eduff@rdaplawn.net

Please note that effective January 1, 2019, our firm name has changed.

RACHLIS DUFF PEEL & KAPLAN, LLC CONFIDENTIALITY NOTICE

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From: Jay Welford <jwelford@jaffelawn.com>
Sent: Wednesday, August 14, 2019 8:38 AM
To: Ellen Duff <eduff@rdaplawn.net>; Michael Rachlis <mrachlis@rdaplawn.net>
Cc: Jay Welford <jwelford@jaffelawn.com>; Alicia Schehr <aschehr@jaffelawn.com>; Eric Novetsky <enovetsky@jaffelawn.com>
Subject: EquityBuild; process regarding bids

We understand that there was a call for sealed bids related to certain of Liberty's properties by the end of day today. Can you outline next steps please regarding the timing for review of those bids, when Liberty will be notified, etc.? Thanks.

Jay Welford
jwelford@jaffelawn.com
248.727.1466

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