

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re:

Chapter 11

AFFORDABLE ENTERPRISES  
OF WESTCHESTER, INC.,

Case No. 14-22168(RDD)

Debtor.

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**ORDER (I) APPROVING BIDDING PROCEDURES AND BREAK-UP  
FEE AND (II) SCHEDULING AN AUCTION  
AND SALE HEARING**

Upon the motion (the “Motion”) of Affordable Enterprises of Westchester, Inc., the debtor and debtor in possession in this chapter 11 case (the “Debtor”), by its attorneys, DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, seeking entry of an order, among other things (i) establishing bidding procedures to govern the sale (the “Sale”) of substantially all of the Debtor’s container business-related assets (the “Assets”), as further defined in the Purchase and Sale Agreement, dated January 16, 2018, a copy of which is annexed to the Motion as Exhibit C (the “PSA”), between the Debtor and Capital Industries Corp. (the “Purchaser”), to the Purchaser, subject to higher and better bids, (ii) scheduling an auction with respect to the Sale (the “Auction”), (iii) approving a Termination Fee to the Purchaser in the event that the Purchaser is not the winning bidder at the Auction, and (iii) scheduling a hearing to approve the Sale of the Assets in accordance with the results of the Auction (the “Sale Hearing”); and a hearing having been held on January 26, 2018 to consider hearing the Motion’s request to consider such relief on shortened notice, and the Court having granted the Debtor’s request to hear the Motion on shortened notice; and a further hearing having been held on January 26, 2018 to consider the “first stage” or interim relief requested in the Motion (the “Hearing”); and upon the record of and representations made at the Hearing; and it appearing that all objections, if any,

having either been resolved, withdrawn or overruled, and good and sufficient cause having been shown, it is hereby

**ORDERED**, that the relief requested in the Motion is granted to the extent set forth herein; and it is further

**ORDERED**, that the PSA is hereby amended to provide that the Termination Fee shall be reduced to \$26,300, broken down as (a) a termination fee of \$13,150 and (b) legal fee reimbursement up to \$13,150; and it is further

**ORDERED**, that the PSA is hereby further amended to provide that the second full sentence of Section 8.2(a) shall apply only in the event that the PSA is terminated not through any fault of the Purchaser; and it is further

**ORDERED**, that the Debtor is authorized to conduct an auction for the Sale of the Assets in accordance with the Bidding Procedures in the revised form annexed hereto as Exhibit A, which Bidding Procedures are hereby approved; and it is further

**ORDERED**, that the Termination Fee, in the reduced amount set forth above, is hereby approved; and it is further

**ORDERED**, that the deadline for submitting bids to become Qualified Bids is **February 21, 2018** at 5:00 p.m. EST, at the offices of Debtor's counsel, DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, One North Lexington Avenue, White Plains, New York 10601, Attn: Jonathan S. Pasternak, Esq., and Debtor's counsel shall promptly provide copies of such Qualified Bids to Purchaser's counsel and the other bidders; and it is further

**ORDERED**, that if any Qualified Bids are received in accordance with the Bidding Procedures, the Debtor will conduct the Auction commencing on **February 23, 2018 at 11:00**

a.m., the offices of Debtor's counsel, DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, One North Lexington Avenue, 11<sup>th</sup> Floor, White Plains, New York 10601; and it is further

**ORDERED**, that the Sale Hearing on the Motion's request for approval of the Sale pursuant to 11 U.S.C. § 363(b) and (f) shall be held before the Honorable Robert D. Drain, United States Bankruptcy Judge, at the United States Bankruptcy Courthouse, 300 Quarropas Street, White Plains, New York 10601, Courtroom 118, on **February 27, 2018 at 10:00 a.m.** or as soon thereafter as counsel may be heard, to confirm the results of the Auction, authorize the sale of the Assets, based upon the results of the Auction, and grant such other related relief as may be deemed necessary or proper by the Court; and it is further

**ORDERED**, that counsel to the Debtor shall file with the Bankruptcy Court a report of Qualified Bids no later than **February 22, 2018 at 12:00 p.m.**, which report shall indicate, among other things, whether the Debtor intends to go forward with the Auction; and it is further

**ORDERED**, that objections to the relief to be considered at the Sale Hearing shall be filed by **February 23, 2018** at 4:00 p.m. with the Bankruptcy Court at the Court's website <https://ecf.nysb.uscourts.gov/cgi-bin/login.pl> (password and log in required), with a copy delivered directly to the Court's chambers and served upon counsel to the Debtor, DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, One North Lexington Avenue, White Plains, New York 10601, Attn: Jonathan S. Pasternak, Esq. so as to be received by such date; and it is further

**ORDERED**, that, notwithstanding the possible applicability of Bankruptcy Rules 6004(h), 7062, 9014 or otherwise, the terms and conditions of this Order shall be immediately effective and enforceable upon its entry, for cause; and it is further

**ORDERED**, that to the extent that this Order is inconsistent with any prior order or pleading, including the Motion, with respect to the proposed Sale, the terms of this Order shall govern; and it is further;

**ORDERED**, that the Court shall retain jurisdiction over any matter or dispute arising from or relating to the implementation of this Order; and it is further

**ORDERED**, that (a) the Debtor shall serve this Order along with the Bidding Procedures upon: (i) the Office of the U.S. Trustee, (ii) all taxing authorities, (iii) counsel to the Purchaser, (iv) all known creditors of the Debtor, (v) all entities known or reasonably believed to have asserted a lien, claim, interest, or encumbrance in any of the Assets, (vi) all potential buyers known by the Debtor to have expressed interest in acquiring any of the Assets, and (vii) all parties that have requested notice pursuant to Bankruptcy Rule 2002 within three (3) business days of entry of this Order.

Dated: White Plains, New York  
January 29, 2018

/s/ Robert D. Drain  
HONORABLE ROBERT D. DRAIN  
UNITED STATES BANKRUPTCY JUDGE

## **Bidding Procedures**

Set forth below are the bidding procedures (the “Bidding Procedures”) to be employed with respect to the transactions contemplated by the Purchase and Sale Agreement between Affordable Enterprises of Westchester, Inc. (the “Seller”) and Capital Industries Corp. (the “Buyer”), dated as January 16, 2018 (the “Purchase Agreement”), concerning the sale of the Assets (defined below).

Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Purchase Agreement. In the event of any inconsistency between the provisions of these Bidding Procedures and the provisions of the Purchase Agreement, the Purchase Agreement shall control. Any person or entity interested in the specific terms of the Sale (defined below) should refer to the Purchase Agreement, a copy of which is available from counsel to the Seller, DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, One North Lexington Avenue, 11<sup>th</sup> Floor, White Plains, New York 10601, Attention: Jonathan S. Pasternak, Esq., Telephone: (914) 681-0200, Facsimile: (914) 684-0288, email: jpasternak@ddw-law.com.

The Seller has determined that: (A) the transactions contemplated by the Purchase Agreement (such transactions being referred to collectively as the “Sale”) shall be subject to competitive bidding as set forth in these Bidding Procedures; (B) the transfer of the Seller’s rights, title and interests in and to the Assets (as defined below) shall be subject to approval by the United States Bankruptcy Court for the Southern District of New York (the “Bankruptcy Court”) pursuant to Sections 363 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532, as amended (the “Bankruptcy Code”); and (C) the Sale shall be subject to such other closing conditions and other terms and conditions as are set forth in the Purchase Agreement.

### **Bidding Process**

These Bidding Procedures describe, among other things, the Assets available for sale, the manner in which prospective bidders may gain access to or continue to have access to due diligence materials concerning the Assets, the manner in which bids become Qualified Competing Bids (as defined below), the receipt and negotiation of bids received, the conduct of any Auction (as defined below), the ultimate selection of the Successful Bidder (as defined below), and the Bankruptcy Court’s approval thereof (collectively, the “Bidding Process”).

### **Assets To Be Sold**

The Assets, as defined in the Purchase Agreement, include: (a) all equipment, machinery and vehicles of the Debtor; (b) all containers owned by the Debtor; (c) all customer lists; and (d) all intellectual property, trademarks, good will and telephone numbers owned by the Debtor.

### **Notice And Solicitation Of Bids**

Within one (1) Business Day following the entry of the Bidding Procedures Order or as soon as reasonably practicable thereafter, the Seller may provide notice, in form and substance satisfactory to the Buyer, of the Sale, the Bidding Procedures, the time and place of the Auction (as defined below), the time and place of the Sale Hearing (as defined below), and the objection deadline for the Sale Hearing to potential bidders who may wish to participate in the Bidding Process by submitting higher and better offers (“Competing Bids”) to purchase the Assets.

Any person or entity other than the Buyer that desires to submit a Competing Bid (a “Bidder”) must do so in writing, provided that such Competing Bid satisfies all of the requirements for Qualified Competing Bids (as set forth below) and is received by the Seller and its counsel at the following address **February 21, 2018 not later than 5:00 p.m. (EST)** (the “Bid Deadline”) (unless the Seller and the Buyer agree to an extension): Seller’s counsel: DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, Attention: Jonathan S. Pasternak, Esq., One North Lexington Avenue, 11<sup>th</sup> Floor, White Plains, NY 10601. Upon receipt, the Seller shall promptly provide copies of all Competing Bids to the Buyer.

#### Qualified Competing Bids

To be considered a qualified Competing Bid (a “Qualified Competing Bid”), each Competing Bid must be received by the Bid Deadline and must comply with all of the following requirements:

- (a) it is in writing and is irrevocable through a closing of the sale of the Assets;
- (b) it includes a duly authorized and executed asset purchase agreement substantially in the form of the Purchase Agreement together with all exhibits thereto, as well as copies of such materials marked to show any amendments and modifications to the Purchase Agreement (the “Marked Agreement”);
- (c) it provides for (i) a cash purchase price for the Assets, expressed in U.S. Dollars, of not less than \$550,000;
- (d) it includes written evidence of a firm, irrevocable commitment for financing, or other evidence of ability to consummate the proposed transaction, that will allow the Seller to make a reasonable determination as to the Bidder’s financial and other capabilities to consummate the transaction contemplated by the Marked Agreement;
- (e) it is not conditioned on any contingencies, such as, without limitation: (i) the outcome of unperformed due diligence by the Bidder, and/or (ii) obtaining financing;
- (f) it includes an acknowledgement and representation that the Bidder: (i) has had an opportunity to conduct any and all required diligence regarding the Assets prior to making its offer; (ii) has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Assets in making its bid; (iii) did not rely upon any written or oral statements, representations, promises, warranties or guaranties whatsoever, whether express or implied (by operation of law or otherwise), regarding the Assets or the completeness of any information provided in connection therewith or the Auction, except as expressly stated in the Marked Agreement; (iv) is duly qualified and licensed to operate the Business (as defined in the Purchase Agreement) and (v) is not entitled to any expense reimbursement or break-up fee in connection with its bid; and
- (g) it is accompanied by a good faith deposit in the form of a wire transfer (to a bank account specified by the Seller), certified check or such other form acceptable to the Seller, payable to the order of the Seller (or such other party as the Seller may determine) in an amount equal to ten (10%) percent of the Competing Bid.

For the avoidance of doubt, and notwithstanding the foregoing, any overbid submitted by the Buyer at any Auction on substantially the same terms as its initial offer (apart from any increase in price) shall be a Qualified Competing Bid.

### Auction

If the Seller receives one or more Qualified Competing Bids in addition to the Purchase Agreement, the Seller, through Auction Advisors, will conduct an auction (the "Auction") of the Assets to select the highest or best bid for the Assets (the "Successful Bid"). The Auction, which shall be transcribed or recorded to the extent required under New York local practice, shall be held at **11:00 a.m. (prevailing Eastern time) on February 23, 2018**, at the offices of DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, One North Lexington Avenue, 11<sup>th</sup> Floor, White Plains, NY 1061, or such other location as shall be timely communicated to all entities entitled to attend the Auction.

The Seller may conduct the Auction in any manner and upon any terms and conditions satisfactory to the Court, permitted by the Purchase Agreement, and consistent with these Bidding Procedures, that will achieve the maximum value for the Assets. Such terms and conditions may include, by way of example, one or more rounds of sealed or open bids from the Buyer and any Bidder who submitted a Qualified Competing Bid. The initial bid at the Auction shall be the highest or otherwise best bid, as determined by the Seller in its reasonable discretion, as among the Buyer's bid and any Qualified Competing Bids, and such initial bid shall be announced to the Buyer and any other Bidder submitting a Qualifying Competing Bid at the commencement of the Auction. Any subsequent bidding for the Assets at the Auction shall be in increments of at least Ten Thousand Dollars (\$10,000.00) or any higher reasonable amount established by the Seller at the Auction.

At the conclusion of the Auction, the Seller shall submit the Successful Bid to the Court at the Sale Hearing (as defined below), for entry of a Sale Approval Order. Any Bid that fails to comply with the Bidding Procedures or any other procedures established at the Auction may be refused.

If no Qualified Competing Bids are received, the Seller and the Buyer intend to seek immediate Court approval of the Purchase Agreement without conducting an Auction.

### Selection Of Successful Bid

Prior to the conclusion of the Auction, the Seller will (a) review and evaluate the Buyer's bid and each Qualified Competing Bid, (b) identify the highest or otherwise best offer for the Assets received at the Auction (such bid, the "Successful Bid" and the bidder making such bid, the "Successful Bidder") and (c) communicate to the Buyer and the Qualified Competing Bidders the identity of the Successful Bidder and the details of the Successful Bid. The determination of the Successful Bid by the Seller shall be final, subject to approval by the Bankruptcy Court.

The Seller will sell the Assets to the Successful Bidder pursuant to the terms of the Successful Bid upon the approval of such Successful Bid by the Bankruptcy Court at the Sale Hearing. For the avoidance of doubt, the Seller shall not consider or support any bid (whether or not such bid is a Qualified Competing Bid) for any of the Assets received after the close of the Auction.

If, following the entry of the Sale Approval Order, the Successful Bidder fails to consummate the Sale because of a breach or failure to perform on the part of the Successful Bidder, the highest or otherwise best bid ("Back-Up Bid") will be deemed the new Successful Bidder and legally obligated and bound to consummate the transaction, and the Seller will be authorized, but not required, to consummate the Sale with the bidder who submitted the Back-Up Bid without further order of the Court. In such case, the good faith deposit of the Successful Bidder shall be forfeited to the Seller and the Seller shall have the right to seek any and all other remedies and damages from the defaulting Successful Bidder to the extent permissible under the applicable purchase agreement and applicable law.

Bid deposits for any unsuccessful bidder will be returned within three (3) business days of conclusion of the Auction, except in the case of the Back-Up Bidder, if any, whose deposit shall be released 3 days after closing in the event it is not deemed the new Successful Bidder.

#### Sale Hearing

A hearing to approve the sale of the Assets to the Buyer or other Successful Bidder will be held on **February 27, 2018** at 10:00 a.m. before the United States Bankruptcy Court for the Southern District of New York, located at 300 Quarropas Street, Courtroom 118, White Plains, NY 10601 (the "Sale Hearing").

If no Qualified Competing Bids are timely submitted and no objections to the proposed sale are timely received, the Court may enter the Sale Approval Order without holding a Sale Hearing. If timely objections to the proposed transaction are received, then the Seller will seek Court approval at a Sale Hearing. Closing of a sale of the Assets is expressly conditioned upon entry of the Sale Approval Order as described in the Purchase Agreement and Sale Motion.

#### Free Of Any And All Liens, Claims, Interests, and Encumbrances

All of the rights, title, and interests of the Seller in and to the Assets, or any portion thereof, to be acquired will be sold, conveyed, transferred, and assigned free and clear of all Liens, Claims, Interests, and Encumbrances pursuant to Section 363(f) of the Bankruptcy Code, such Liens, Claims, Interests, and Encumbrances to attach to the net proceeds of the sale of the Assets. Upon request of a successful bidder, the Debtor's non-residential real property lease for the rental of its office premises shall be assumed by the Debtor and assigned to the Purchaser at closing.