

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS
KANSAS CITY DIVISION

IN RE:)	
)	
LARKIN EXCAVATING, INC.)	Case No.17-20890-11-dls
Debtor.)	Chapter 11
_____)	

**AMENDED MOTION FOR ORDER
(1) AUTHORIZING SALE OF SUBSTANTIALLY ALL ASSETS
OF DEBTOR BY AUCTION FREE AND CLEAR OF ENCUMBRANCES
PURSUANT TO 11 U.S.C. § 363; (2) APPROVING BIDDING PROCEDURE
AND SETTING TIME AND DATE FOR HEARING AND AUCTION
(Related Doc. 74)**

Larkin Excavating, Inc., Debtor and Debtor-in-possession herein, presents this Amended *Motion for Approval of Sale of Substantially All Assets of Debtor Pursuant to 11 U.S.C. § 363* (“**the Motion**”).

1. On the 17th day of May, 2017, (“**the Petition Date**”) Larkin Excavating, Inc. (“**Larkin**”), a Kansas corporation operating an excavation business located at 13575 Gilman Rd in Lansing, Kansas, filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the Bankruptcy Code). Pursuant to §§ 1107 and 1108 of the Bankruptcy Code, Larkin remains as Debtor-in-Possession

2. This Court has jurisdiction over the Motion pursuant to 28 U.S.C. § 1334 and § 363 of the Bankruptcy Code. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2) and venue of this bankruptcy proceeding and this Motion is proper under 28 U.S.C. §§ 1408 and 1409. The statutory predicates for the relief sought herein are 11 U.S.C. §§ 105(a), and 363(b) and (f).

3. Larkin’s assets consist primarily of a landfill/quarry, real property, an office building, warehouse and yard located at 13575 E. Gilman Rd., Lansing, Kansas, equipment used in and necessary for the operation of Larkin’s business, accounts receivable, intellectual property

and intangible, other miscellaneous personal property and leases (subject to the lessor's rights to approve the assumption and assignment of the leases)(hereinafter collectively referred to as "**the Assets**").

4. Larkin has struggled for many years, resulting in, among other payables, a significant tax debt in excess of \$1,000,000.00 owed to the Internal Revenue Service and other taxing authorities. By the Petition Date, Larkin's debts far exceeded its ability to pay or reorganize. Because of the substantial tax debt and continuing capital needs of the business, for which Larkin lacks funding sources, Larkin has determined that it is in its best business judgment and the best interests of the bankruptcy estate to sell substantially all of Larkin's Assets.

5. On June 23, 2017, Flat Land Excavating, LLC, a Kansas limited liability company, ("**Flat Land**") presented Larkin with a Letter of Intent ("**the LOI**") under which Flat Land has offered to purchase substantially all of the Assets for \$2,010,000.00 ("**the Purchase Price**"). A copy of the LOI is attached and incorporated by reference as **Exhibit A**.

The Sale Contract

6. Larkin proposes to sell the Assets to Flat Land, free and clear of liens and encumbrances, pursuant to 11 U.S.C. § 363(b), which permits a debtor, after notice and hearing, to sell, other than in the ordinary course of business, property of its estate, and 11 U.S. C. 363(f), which permits this sale to proceed if the parties holding secured interests in the Assets consent to the sale or the sale proceeds will be sufficient to satisfy those liens.

7. Pursuant to the LOI Flat Land and Larkin have agreed to a sale of the Assets to Flat Land for a purchase price of \$2,010,000.00. The terms of the sale shall be memorialized in

an Asset Purchase Agreement, the form of which Larkin intends to file prior to the sale date and to present to any prospective bidders who request it.

8. Flat Land is purchasing the property in an "as is" condition and agrees to accept said property in its present condition.

9. If Flat Land is not the winning bidder at the auction for the sale of the Assets, Flat Land shall be entitled to receive \$37,500.00 as a break-up fee.

COMPETING BIDS

10. Should parties other than Flat Land desire to submit competing offers to purchase the Assets, those offers shall be subject to the following terms and conditions:

- a. Pending approval of this Motion, an Auction will be conducted on September 14, 2017, at 10:00 a.m., as scheduled by the Court (**"the Auction Date"**).
- b. Any purchase offer for all of the Assets must be submitted in an initial amount not less than \$2,085,000.00.
- c. Any subsequent bids shall be in minimum increments of \$75,000.00, or such lesser amount as Larkin considers appropriate, which may be determined at the sale hearing.
- d. Any competing bid shall be on terms which are no more burdensome or conditional to Larkin or less burdensome or conditional to the bidder than are the terms of the Asset Purchase Agreement.

e. Any competing bid shall not be contingent upon either receipt of financing necessary to its consummation, or upon completion of any due diligence.

f. In order to participate in any bidding or auction process conducted at the hearing on this motion a competing bidder must have provided to Debtor's counsel or appear with:

i. appropriate evidence of its financial ability to consummate a contract should such party be the successful bidder at the hearing on this motion; and

ii. a cashier's check in the amount of \$25,000.00 as and for an earnest money deposit, which deposit shall be refundable should the bidding process not result in a sale to the competing bidder.

g. Any competing bidder must be able to perform under and enter into a contract substantially similar to the Asset Purchase Agreement no later than October 15, 2017. Closing of the sale may occur prior to October 2, 2017, but possession of the assets shall not be granted until Larkin has completed the pending job known as the Y Belton job, which is scheduled to be concluded by October 1, 2017.

h. Any person who desires to submit a competing bid prior to the hearing on this motion and who desires to conduct a due diligence investigation with Larkin's cooperation shall be entitled to conduct such due diligence investigation upon the following conditions:

- i. The competing bidder shall deliver a Confidentiality Agreement in the form attached as **Exhibit B** and a non-binding letter of intent to Larkin, through its counsel, indicating its interest in the acquisition of the Assets and setting forth the terms of its proposed offer, including its intent to be bound by the terms of this motion and the Asset Purchase Agreement.
- ii. The competing bidder shall, contemporaneously with submission of its letter of intent, provide appropriate evidence of its financial ability to consummate a contract should such party be the successful bidder at the hearing on this motion.
- iii. The competing bid shall be accompanied by an earnest money deposit in the amount of \$25,000.00, which shall be in the form of a cashier's check and shall be refundable should the competing bid not be the prevailing bid at the hearing on this motion.
- i. The competing bidder shall not tender an offer which is contingent on completion of due diligence.

11. The Assets are, either in part or in whole, subject to the liens of Central Bank of the Midwest, the Internal Revenue Service, Commercial Credit Group, Inc., University National Bank, CNH Industrial Capital America LLC, and Spectrum Health Foundation, Inc. (“**the Secured Parties**”), which liens shall attach to the proceeds of this sale in the order of their priority or to the extent of their interests.

12. The Debtor has also identified parties who have filed UCC Financing Statements but who, the Debtor believes, are no longer creditors of the Debtor. However, as the UCC Financing Statements have not been terminated, out of an abundance of caution, the Debtor shall provide notice to the following additional potential secured parties:

- a. Komatsu Financial Limited Partnership, 1701 West Golf Road, Suite 300, Rolling Meadows, IL 60008. A UCC was filed on April 2, 2008, continued on March 1, 2013, and lapses on April 2, 2018. A second UCC was filed on October 29, 2008, continued on August 2, 2013, and lapses on October 29, 2018. As the Debtor paid this creditor in full in early 2015, the Debtor contends that Komatsu is not a creditor of the Debtor.
- b. Kubota Leasing, 655 Business Center Drive Suite 250, Horsham, PA 19044. The UCC was filed on December 31, 2012, and lapses on December 31, 2017. The Debtor contends that Kubota is no longer a secured creditor as Kubota repossessed and sold its collateral prior to the filing of this case.
- c. Community First Bank, 650 Kansas Ave, Kansas City, KS 66105. The UCC was filed on April 11, 2016, and lapses on April 11, 2021. The Debtor does not believe Community First Bank is a creditor but also believes that this is a duplication of the UCC filed by Kubota Leasing.
- d. Corporation Service Company, PO Box 2576, Springfield, IL 62708. The UCC was filed on September 6, 2016, without an information concerning on whose behalf the UCC was filed. The Debtor contends that this is an invalid UCC.

13. Pursuant to 11 U.S.C. § 363(f), the sale of the Assets shall be free and clear of all mortgages, liens, pledges, hypothecations, security interests, charges, encumbrances, claims and interests. To the extent that the mortgages, liens, pledges, hypothecations, security interests, charges, encumbrances, claims and interests are valid and not avoidable, they will follow the proceeds of said sale.

14. Larkin believes this sale is in the best interests of the Chapter 11 estate and its creditors, is proposed in good faith, and is supported by a substantial business justification.

15. Larkin engaged in an intensive effort for approximately one (1) year to find a purchaser for the Assets and has solicited interest or has received expressions of interest from other parties, to whom copies of this Amended Motion and the Notice of Hearing will be sent. Prior to receiving the LOI from Flat Land and despite its best efforts, Larkin had not received any other similar or better offer for the purchase of the Assets. While Larkin has continued its efforts to find interested purchasers, only two other parties have, at this time and subsequent to the Petition Date, exhibited an interest in purchasing the Assets. One party, after conducting initial due diligence, has declined to tender an offer, and the other is just starting its review to determine if it desires to make an offer.

16. Larkin asserts that its efforts to date, coupled with the bidding procedures detailed in this Motion, will garner the best and highest price for the Assets.

17. Flat Land is a bona fide good faith purchaser for value and has represented that it is, as will be more fully and completely described in the Asset Purchase Agreement, prepared to purchase the Assets.

18. The LOI was, and the Asset Purchase Agreement will be, negotiated at arm's length. There has been no self-dealing, bad faith, fraud, or unfair dealing relative to the negotiation of the sale of the Assets.

19. The Secured Parties, through their respective counsel, have been closely involved with the proposed sale and these procedures, and have communicated directly with Flat Land and

its counsel to negotiate the terms of the sale. Larkin believes the Secured Parties support this sale and its process.

20. Larkin therefore requests that it be authorized to complete and to conduct the sale to Flat Land pursuant to § 363(b) of the Bankruptcy Code, which permits sale of the property of the estate, other than in the ordinary course of business, after notice and hearing.

21. Larkin further requests that, upon closing of the sale, all net sale proceeds be paid to the Secured Parties in the order of their priority or to the extent of their interest for application against the indebtedness owed to that party, as agreed upon between Larkin and the Secured Parties or as determined by the Court.

22. The Debtor shall serve a copy of this Motion, by ECF, email or regular mail, whichever is most appropriate for any given party, on (i) the United States Trustee; (ii) the secured creditors through their counsel; (iii) all unsecured creditors; (iv) any party who has requested notice pursuant to Fed. R. Bankr. R. 2002; (v) the parties identified in paragraph 12 above; and (vi) any party who has inquired about the sale of the assets.

WHEREFORE, Larkin prays that this Court:

1. Authorize Larkin to enter into an Asset Purchase Agreement with Flat Land. upon substantially the terms set forth in the LOI;

2. Approve the Bidding Procedures;

3. Order that:

a. The sale be free and clear of all mortgages, liens, pledges, hypothecations, security interests, charges, encumbrances, claims and interests with any

such mortgages, liens, pledges, hypothecations, security interests, charges, encumbrances, claims and interests attaching to the sale of the proceeds of the sale;

- b. All net sale proceeds be paid to the Secured Parties in the order of their priority or to the extent of their interests and for application against the indebtedness owed to that party, as agreed upon between Larkin and the Secured Parties, or as determined by the Court. In the event the sale proceeds exceed the aggregate debt due the Secured Parties, Larkin shall retain those proceeds for disbursement upon proper application to the Court; and

4. Grant such other and further relief as the court deems just and proper.

Respectfully Submitted:

EVANS & MULLINIX, P.A.

/s/ Joanne B. Stutz

Joanne B. Stutz, KS #12365; MO #30820

7225 Renner Road, Suite 200

Shawnee, KS 66217

(913) 962-8700; (913) 962-8701 (Fax)

jstutz@emlawkc.com

Attorneys for Larkin Excavating, Inc.

LETTER OF INTENT

This letter (this "Letter") is intended to propose the terms of a potential purchase and sale by LARKIN EXCAVATING, INC., a Kansas corporation ("Larkin") of the assets of Larkin (the "Business"), with the purchaser being FLAT LAND EXCAVATING, LLC, a Kansas limited liability company ("Purchaser"). Flat Land is a newly formed Kansas limited liability company owned by Shawn and Christy Britz. Larkin and Purchaser shall sometimes be referred to herein as a "Party" or collectively the "Parties," and the potential acquisition as outlined herein as the "Transaction." This proposal is put forth for the purpose of agreeing to move toward the development of one or more binding agreements (the "Definitive Agreements"), and shall remain valid until withdrawn by either Party as provided herein. Portions of this Letter are binding and portions of this letter are not binding except as set forth in Section 5 below.

1. **Proposed Transaction.** The principal terms of the Transaction are anticipated to be as follows:

a. **Assets Purchased:** The following assets are to be purchased by Purchaser (collectively, the "Assets"):

- i. **Office, Warehouse and Yard.** The real property located at 13575 E. Gilman Rd., Lansing, Kansas and all improvements on the real property and all rights appurtenant to the real property (the "Real Property").
- ii. **Landfill and Quarry.** The landfill and quarry located at 31358 227th Street, Easton, Kansas (the "Landfill").
- iii. **Equipment.** All equipment owned by Larkin (the "Equipment").
- iv. **Intellectual Property and Intangibles.** The name "Larkin Excavating, Inc.", the name "Larkin" and any and all other trademarks, copyrights, permits (in particular the permit for the operation of the Landfill), warranties (for the Equipment or otherwise), plans and specifications and other intangibles identified by Purchaser during the Inspection Period (the "Intangibles").
- v. **Minerals.** All minerals and/or oil and gas rights related to the Real Property and the Landfill (the "Mineral Rights").
- vi. **Personal Property, Inventory, Tools and Trade Fixtures.** All personal property, inventory, supplies, vehicles, tools, office furniture and fixtures used in the operation of the existing business of Seller (the "Personal Property").
- vii. **Accounts Receivable.** All accounts receivable owed to Larkin from third parties (the "AR").

b. **Liabilities Assumed:** The following liabilities are contemplated to be assumed by Purchaser (the "Assumed Liabilities"):

- i. **Equipment Leases.** Any and all leases for equipment not owned by Larkin and which are accepted by Purchaser during the Inspection Period (the "Equipment Leases").
- ii. **Existing Work Contracts.** Those existing work contracts that are executed by Larkin and either are in process are to be started after the Closing Date which are accepted by Purchaser during the Inspection Period (the "Work Contracts").

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EXHIBIT

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iii. Service Contracts. Those service contracts for the Real Property and/or Landfill which are accepted by Purchaser during the Inspection Period (the "Service Contracts").

c. Excluded Liabilities: Any and all liabilities which are not Equipment Leases, Work Contracts, or Service Contracts and which are not accepted by Purchaser during the Inspection Period are specifically excluded from the Transaction (the "Excluded Liabilities").

d. Employees: Purchaser will not assume any employee contracts or obligations as part of the Transaction. During the Inspection Period, Purchaser will identify employees that it desires to hire (the "Key Employees"). The Key Employees will be terminated by Larkin as of the Closing Date and hired by Purchaser as of the Closing Date.

e. John Larkin: Purchaser contemplates offering an employment agreement or consulting agreement to John Larkin on the Closing Date, the terms of which will be negotiated and agreed upon during the Inspection Period.

f. Purchase Price, Inspection Period and Closing Date: The consideration to be paid by Purchaser will be as follows:

i. Deposit and Breakup Fee. Upon execution of the Definitive Agreements, Purchaser will deposit \$25,000 (the "Deposit") with Evans and Mullinix P.A. law firm located at 7225 Renner Rd, Shawnee, Kansas 66217, pursuant to an escrow agreement and will act as escrow agent for this transaction (the "Escrow Agent"). The Deposit will be non-refundable once deposited unless Purchaser is not the winning bidder at the auction for the sale of the Assets. Seller may use Purchaser as a so-called stalking horse for an auction of the Assets and if Purchaser is not the winning bidder, then Purchaser will receive a refund of the Deposit and a fee of \$20,000 as a breakup fee payable to Purchaser from the sale proceeds. Seller agrees to recommend to the applicable Bankruptcy Court the following procedures (i) bidding increments will be in \$100,000 increments and (ii) all Assets of Seller will be sold as one unit.

ii. Purchase Price. The total purchase price for the Assets is \$2,010,000.00 (the "Purchase Price"), with the allocation of the Purchase Price to be determined within the Definitive Agreements.

iii. Inspection Period and Closing Date. The "Inspection Period" will commence upon execution of this Letter and will be no more than 30 days. The "Closing Date" will be no more than 15 days after entry of an Order authorizing the sale of the assets to Purchaser. Notwithstanding the foregoing, Purchaser will be allowed to conduct due diligence on all matters related to the Assets and Assumed Liabilities (and other related, reasonable matters) beginning upon the execution of this Letter and continuing through the Closing Date or disapproval by the Bankruptcy Court. Larkin will reasonably cooperate with such inspections and will grant access to Purchaser and its agents.

g. Title, Fees, Costs and Prorations. Title to the Assets will be conveyed free and clear and with Court Approval. Each Party will pay its professional fees, Larkin will pay for the title commitments and recording costs associated with the conveyance documents. Purchaser will pay for the title policies and required due diligence reports (survey, Phase 1, etcetera) and any lender fees. Expenses and income relative to the real property assets will be prorated as of the Closing Date and expenses associated with the Equipment Leases will be prorated as of the Closing Date, along with other customarily prorated income and expenses for transactions of a similar nature.

2. **Confidential Information.** Unless otherwise required by the Bankruptcy Court, the Parties agree to keep confidential information that is identified by either Party as confidential.

3. **Broker.** Neither Party has engaged a broker in connection with the consummation of the Transaction.

4. **Exclusivity.** Once the Definitive Agreements are executed, Larkin agrees to exclusively negotiate with Purchaser and not enter into agreements for the sale of the Assets to other parties.

5. **Letter Not a Binding Agreement.** This letter sets forth the terms of our preliminary discussions but it is not intended to be a binding or enforceable agreement. The Parties contemplate that they will become legally bound only upon the earlier of execution of Definitive Agreements relating to the Transaction or entry of a Court Order approving the sale to Purchaser. Notwithstanding the foregoing, the Parties expressly agree that the provisions of Sections 2 and 6 hereof are intended to be legally binding and enforceable agreements between the Parties in accordance with the terms of such Sections.

6. **Disputes.** Any legal action brought by a Party in connection with this Letter shall be in the applicable courts of the United States Bankruptcy Court for the District of Kansas, sitting in Kansas City, Kansas.

During the period of discussions and negotiation of this Transaction, Larkin will use its best efforts to operate in the ordinary course of business subject to the pending Bankruptcy Court proceedings and will not enter into any unusual or untypical transactions.

If this letter is acceptable, please so execute as indicated below.

Purchaser:

Flat Land Excavating, LLC

By: Christy Butte
Name: Christy Butte
Title: Authorized Member

Larkin Excavating, Inc.
By: John Larkin
Name: John Larkin
Title: President

**Confidentiality Agreement
(Due Diligence Information)**

This agreement (this "**Agreement**") is dated effective _____, 2017, and is entered into by and between Larkin Excavating, Inc., a Kansas corporation ("**Provider**") and _____ ("**Recipient**").

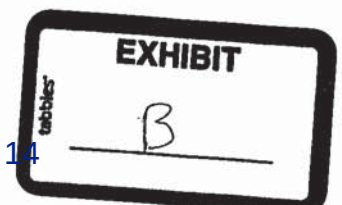
Provider may furnish to Recipient, in connection with Recipient's possible purchase from Provider of assets owned by Provider (collectively, the "**Property**"), certain confidential information about the Property including employee reports (the "**Personal Information**"), equipment lists, existing contracts and leasing agreements and the Personal Information (as defined below) (the "**Confidential Information**").

Recipient agrees that it will keep the Confidential Information confidential and that it will make no use thereof other than for the purpose of evaluating Recipient's interest in the purchase of the Property. Recipient agrees not to distribute the Confidential Information to any party without the prior written consent of Provider, provided, however that Recipient may distribute the Confidential Information to its professionals such as attorneys or accountants and lender. Recipient agrees that it will destroy all such Confidential Information upon request from Provider or if Recipient fails to purchase the Property.

Recipient agrees that, to the extent Recipient receives, or otherwise has access to, any Personal Information (as defined below) regarding Provider's employees, it shall: (i) use such information only to the extent necessary to evaluate the proposed Property purchase and not otherwise unless instructed by Provider in writing; (ii) keep Personal Information as Confidential Information as defined above and treat it as such, and (iii) limit access to Personal Information to only those professionals that would otherwise have access to Confidential Information; and (iv) put into place appropriate technical and organizational measures to protect any such Personal Information against unauthorized or unlawful processing and against accidental loss, destruction, or breach of security of, any Personal Information in compliance with all applicable law.

Recipient may disclose Confidential Information in the following circumstances: (i) disclosure required by laws, regulations, a court order, (ii) disclosure made to its attorneys, lender and consultants specifically engaged to review such information, or (iii) the information is publicly available or known to recipient other than through Provider. All information is presented as is, where is and without representation or warranty.

This Agreement will remain in force for one (1) year from the date last signed by the parties below. Time is of the essence. The law of the State of Kansas shall apply to this Agreement and any and all disputes arising hereunder shall be litigated in Johnson County, Kansas, the parties executing this Agreement waive any and all other forum choices and consent for convenience that Johnson County, Kansas is the proper venue and jurisdiction for all disputes arising from this Agreement. The prevailing party to any litigation shall be entitled to attorney fees and other reasonable costs and expenses of litigation.



This Confidentiality Agreement is executed as of the date set forth in the first paragraph hereof.

PROVIDER:

Larkin Excavating, Inc.

By: _____

Name: _____

Title: _____

RECIPIENT

By: _____

Name: _____

Title: Authorized Member