

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re

WELDED CONSTRUCTION, L.P.,
et al.,

Debtors.

Chapter 11

Case Nos. 18-12378 (KG), *et seq.*
(Jointly Administered)

Hearing Date: January 3, 2019, 10:00 a.m.
Objection Deadline: December 31, 2018, 10:00 a.m.

**CONSUMERS ENERGY COMPANY’S RESPONSE
AND RESERVATION OF RIGHTS TO DEBTORS’ MOTION
FOR ENTRY OF AN ORDER AUTHORIZING ASSUMPTION
AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACT
PURSUANT TO SECTION 365 OF THE BANKRUPTCY CODE**

Consumers Energy Company (“CEC”), by its undersigned attorney, hereby files this response and reservation of rights to the Motion for Entry of an Order Authorizing Assumption and Assignment of Certain Executory Contract Pursuant to Section 365 of the Bankruptcy Code (the “Motion”) filed by Welded Construction Michigan, LLC (the “Debtor”) and Welded Construction, L.P. (collectively with the Debtor, the “Debtors”), and in support hereof states as follows:

1. On October 22, 2018 (the “Petition Date”), the Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. Since the Petition Date, the Debtors have managed their affairs and remained in possession of their assets as debtors in possession pursuant to 11 U.S.C. §§ 1107 and 1108.

2. On the Petition Date, the Debtor was a party to an agreement with CEC dated February 19, 2018 called “Contract for Pipeline Construction for the Saginaw



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Trail Pipeline Project: Phase 2, 3, and 4” (including all attachments and associated agreements, the “Agreement”), pursuant to which the Debtor, as contractor, agreed to oversee a multi-phase pipeline construction project for CEC (the “Work”), which is a public utility in and for the State of Michigan.

3. The Debtor had many obligations and covenants under the Agreement, including but not limited to overseeing the services performed by subcontractors in accordance with various specifications and deadlines, divided into four phases. Under the Agreement the Debtor was obligated to retain certain subcontractors approved by CEC and bill CEC for their pre-agreed costs. Upon receiving the funds from CEC, the Debtor was obligated to pay them to the subcontractors whose bills were included in each respectively paid invoice. The Debtor’s fee for these services was fixed in accordance with the Agreement and billed separately. CEC received a large number of bills from the Debtor for the work performed by subcontractors in connection with the Work and CEC timely paid all of them.

4. After the Petition Date, CEC learned that—before the Petition Date—the Debtor had collected monies from CEC earmarked for subcontractor invoices but used them for the Debtor’s own purposes. This was a violation of the Agreement, as well as a violation of Michigan law. See Michigan Building Contract Fund Act, Mich. Comp. Laws § 570.151 *et seq.* Furthermore, multiple subcontractors alerted CEC that because they were not paid in full for the services they provided, they had initiated the process to acquire the information necessary to record mechanic’s liens

against the real property owned by CEC and/or execute upon a construction bond posted by the Debtor at the beginning of the project.

5. After the Petition Date, the Debtor and CEC entered into negotiations over defaults in the Agreement, culminating in the execution of the “Customer Project Completion Agreement with Consumers Energy Company” (the “Consumers Project Completion Agreement”) approved by this Court’s Order Approving the Consumers Project Completion Agreement with Consumers Energy Company (Docket No. 181) (the “Consumers Order”).

6. The Debtors correctly recite in the Motion that the Consumers Project Completion Agreement allowed for a 45-day window for the Debtors to assume and assign the Agreement, but that agreement also expressly gives CEC “sole discretion” to approve the assignment. CEC’s sole discretion to approve the transaction is recited in ¶ 4(c) of the proposed assumption and assignment agreement attached as part of Exhibit A to the Motion (the “Proposed Assumption and Assignment Agreement”). As of this date, CEC has not approved the assumption and assignment of the Agreement, to the proposed purchaser or anyone else.

RESERVATION OF RIGHTS

7. CEC reserves the right, in its sole discretion, to approve (or withhold approval of) the assumption and assignment of the Agreement to any proposed

assignee, including but not limited to Snelson Companies, Inc. (the “Stalking Horse”).

RESPONSE TO MOTION

8. In addition to CEC’s right of sole discretion, CEC requests that the Court condition its approval of the assumption and assignment of the Agreement upon the following:

- (i) Any order approving the assumption and assignment should contain mechanisms satisfactory to CEC to ensure that subcontractors for services and materials furnished in connection with the Agreement are paid, such as extending the enforceability of the Debtors’ existing construction bond to pre-assignment claims or requiring the purchaser of the Agreement to satisfy any such claims.
- (ii) CEC should not be bound to any waiver of defaults (for the reasons stated below).
- (iii) It should clarify that a “default” refers only to a default specifically defined under the Agreement by that name and should preserve CEC’s rights to enforce the Debtor’s obligations under the Agreement that do not (or do not yet) constitute defaults against the buyer.
- (iv) Although it is not clear that this is the Debtor’s intention (or that the Debtor’s subcontractors have been given sufficient notice to bind them), nothing in any order approving the assumption and assignment should bar subcontractor claims against the Debtor.
- (v) An assumption and assignment of the Agreement should not affect the Debtor’s obligations, if any, for warranties associated with the work it performed or supervised, including but not limited to the right to enforce warranties against subcontractors, material suppliers, and other project vendors to repair or replace defective materials and services.

- (vi) The buyer should be required to assume the Debtors' obligations under the Consumers Project Completion Agreement, including but not limited to:
 - a. Recognition of the termination fee paid by CEC in connection with the Consumers Project Completion Agreement, and
 - b. The Debtor's obligation to hold the termination fee separately and apply those funds for specific purposes.

9. Section 365(b)(1)(A) of the Bankruptcy Code permits the assumption of an executory contract only if all defaults under the contract are cured or there is adequate assurance that they will be promptly cured.

10. The proposed order submitted with the Motion (the "Proposed Order") contains the typical protections included in motions to assume executory contracts filed in this district, including but not limited to protections for the buyer from pre-assignment claims under the Agreement and protections for the Debtors' estates for claims under the Agreement whether pre- or post-closing. The Debtors are requesting, among other things, a determination that "no default requiring a cure exists with respect to the Consumers Contract prohibiting such assumption and assignment."

11. It may be common to state a "proposed cure amount" and seek to bind the non-debtor party to the proposed amount if there is no objection. But in most of those cases, both parties to the target lease or contract possess defined, predictable expectations about what obligations the debtor has met or breached and equal access

to whether the amounts have been paid. In this case, however, the Debtor holds most of the cards because only the Debtor knows which subcontractors have been paid and which have not. Many of the lien-waivers that the Debtor was supposed to provide to CEC have not been returned, so CEC does not have a clear picture of what subcontractors are still unpaid.

12. Also, the language of § 365(b)(1)(A) requires the curing of “defaults,” but it is not always clear what obligations are in default versus merely being owed. The Bankruptcy Code does not require a debtor to pay all amounts owed at the time of assumption, merely to “cure, or provide[] adequate assurance that the [debtor] will promptly cure, *such default*[,]” § 365(b)(1)(A) (emphasis added). Therefore, it would reach beyond the scope of this section to impose a waiver upon CEC for amounts that were due but technically not in default. This is material because one interpretation of the Agreement is that any amounts due to subcontractors but not paid may simply be offset by CEC against future payments to the Debtor.

13. Instead of attempting to bind CEC to contract default information produced at the last-minute, it makes more sense for the Court to order that whatever obligations exist under the Agreement, whether or not in default, shall remain after the assumption and assignment. The contract itself provides an adequate remedy for obligations that have not been met as of the date of assumption, and the Debtor and buyer can create a mechanism for the Debtor to indemnify the buyer for any pre-closing liabilities that are discovered post-closing.

14. Furthermore, the Agreement contains numerous warranties by the Debtor that should not be limited by any proposed assumption and assignment. For instance (and without limitation), the Debtor has warranted that the work will be free of toxic/hazardous materials (Section 16), that title to the materials and equipment supplied by the Debtor will be free and clear (Section 24.1), and that the workmanship and materials will conform to the contract and will be constructed in a good and workmanlike manner (Section 24.2). CEC also receives the right to enforce warranties directly against any subcontractors (Section 24.3). The Agreement provides that CEC has no obligation to supervise the work and expressly preserves all warranties notwithstanding that it may not raise any objection during any observation, inspection, witnessing or review of the project (Section 11.5). Under the circumstances, it would be inappropriate to waive any warranty rights that CEC may have merely because they were not discovered as of the date of assumption and assignment of the Agreement to a third party.

15. Finally, as noted above, in addition to the Agreement, the Debtor and CEC entered into the Consumers Project Completion Agreement, pursuant to which the parties made certain stipulations concerning (among other things) the amounts paid and payable by CEC, application of the termination fee previously paid by CEC, and covenants by the Debtor to apply and pay funds to the unpaid claims of project vendors. Even though the Consumers Project Completion Agreement was executed

postpetition, it is integrated with the Agreement and should be assigned to (and assumed by) any buyer as part of the assumption and assignment of the Agreement.

WHEREFORE, CEC respectfully reserves all of its rights and privileges under the Agreement and the Consumers Project Completion Agreement and requests that this Court condition the approval of the assumption and assignment of the Agreement upon the provisions set forth above.

Dated: December 26, 2018
Wilmington, Delaware

Respectfully submitted,

HILLER LAW, LLC

/s/ Adam Hiller

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 26, 2018, I caused copies of the foregoing Response And Reservation Of Rights To Debtors' Motion For Entry Of An Order Authorizing Assumption And Assignment Of Certain Executory Contract Pursuant To Section 365 Of The Bankruptcy Code to be served via first-class mail, postage prepaid, upon:

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Dated: December 26, 2018
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