

**Superior Court of Justice  
Commercial List**

**FILE/DIRECTION/ORDER**

NATIONAL BANK OF CANADA

Applicant

and

NIMBUS ENVIRONMENTAL SOLUTIONS INC., OAKDALE ENTERPRISES  
INC., NIMBUS WATER SYSTEMS INC., 365 PRO INSTALLATION INC.,  
2242462 ONTARIO LIMITED AND WATER FILTER CART INC.

Respondents

Counsel	Telephone No:	Email/Facsimile No:
As per Participant Slip		

Heard and released: November 12, 2021

**Conway J. - Endorsement**

1. BDO is the receiver of the respondent corporations (“**Nimbus Group**”). It brings this motion for an approval and vesting order (“**AVO**”) and fee and activity approval order. The AVO is with respect to the proposed purchase of assets of Nimbus by 2752837 Ontario Inc. (“**275**”).
2. 275 was a stalking horse bidder under a sales and investment solicitation process (“**SISP**”) approved by this court on September 13, 2021. 275 provided a deposit of \$650,000 to the Receiver, 5% of the stalking horse price of \$13 million. The stalking horse agreement was deemed to be a Qualified Bid under the SISP. The purpose of the SISP was to determine

whether a better transaction than the stalking horse agreement could be obtained by the Receiver. Any such transaction had to come from a “Qualified Bidder”.

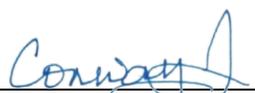
3. Peter Bozzo is the majority shareholder of the Nimbus Group and the guarantor of its obligations to the Applicant. He brings this motion to oppose the sale to 275. There is no dispute that he has standing on this motion as an interested party.
4. Mr. Bozzo says that there was another bid for just over \$18 million by a company named Acquamia Inc. He says Acquamia has funding for the transaction through Sincere Distribution Inc. Sincere’s funding source is a company named Carbon Development Ltd.
5. On his motion, and in addition to his own affidavit, Mr. Bozzo has tendered the evidence of Sincere’s lawyer Colin James and Sincere’s CFO Stefano Caserta. Their position is that owing to confusion in the wording of the SISP and the subsequent amendment of the SISP by the Receiver, they were held not to be a Qualified Bidder and not permitted to participate in an auction under the SISP. Specifically, they argue that the Receiver did not follow the provisions of the SISP when it required Acquamia to post a deposit of \$905,000 in order for it to be considered a Qualified Bidder.
6. Mr. Caserta says that because the Receiver was not following the SISP terms, Sincere did not want to provide the deposit as it might end up forfeiting those funds “to the whims of a Receiver that is ready, willing and able to change its mind and processes at any time.”
7. Mr. Bozzo asks that the sales process be re-opened and an auction conducted as between 275 and Acquamia. He relies on a letter from Mr. James of today’s date that if the court allows the auction to proceed, Acquamia will have CDs of \$18.1 million lodged with a Canadian bank by November 26, 2021. In addition, Mr. Gilmore says that he has oral confirmation that a deposit of \$1 million from a residential mortgage lender will be sent to his trust account by Monday.
8. I reject all of these submissions and am granting the AVO for the following reasons.
9. Under the SISP, the Receiver was entitled to determine whether a potential bidder was a Qualified Bidder. The Receiver is to make that determination “exercising its reasonable business judgement” to see whether the bidder “has the financial capability based on the availability of financing, experience and other considerations, to be able to consummate a sale or investment pursuant to the SISP”.
10. In addition, under paragraph 7 of the SISP(under Formal Binding Offers), a Bid had to include “written evidence of a firm, irrevocable commitment for financing or other evidence of ability to consummate the proposed Transaction that would allow the Receiver to make a determination as to the Bidder’s financial and other capabilities to consummate the proposed Transaction”.
11. As outlined in the Receiver’s Second Report and the Supplement thereto, the Receiver was not satisfied that Acquamia was a Qualified Bidder based on the materials sent to the Receiver. In particular, it was concerned that the documents provided did not represent a firm, irrevocable commitment for financing. The Receiver received from Mr. James a

document that proposed to authenticate a bank draft for \$30 million from Royal Bank Pacific to Carbon. The Receiver was concerned about the negotiability of that bank draft and unable to find satisfactory public information about Sincere, Carbon and Royal Bank Pacific. It therefore requested that Acquamia provide the \$905,000 deposit (5% of the bid amount).

12. There was no basis for any confusion by Acquamia/Sincere nor do I find that there was any such confusion. The record clearly establishes that the Receiver needed the deposit to qualify Acquamia in light of the lack of negotiability of the bank draft it had provided. This was made clear to Mr. James, for example, in Mr. Stern (BDO)'s email of October 15.
13. The record also establishes that the Receiver was diligently working with Acquamia and Sincere and their advisors, following up regularly on the status of the deposit and the bank draft to try to qualify Acquamia. The Receiver tried to accommodate Acquamia. It extended the bid deadline from October 13 to 15 and then again to October 26. Ultimately, neither was provided to the Receiver by October 26. The Receiver therefore did not consider Acquamia to be a Qualified Bidder and held that 275 was the winning bid under the SISP.
14. The factors in determining whether a sale by a receiver should be approved are well known and set out in the case of *Royal Bank v. Soundair*, (1991), 4 O.R. (3d) 1 (C.A.), para. 16.
15. It is part of the very essence of a Receiver's function to make business judgments based on the information then available to it: *Skyepharm PLC v. Hyal Pharmaceutical Corp*, (1999) 12 C.B.R. 87 at para. 4; *Soundair*, at para. 21. The court should only enter into the sale process where it is satisfied that a receiver has not properly conducted the sale: *Soundair*, at para. 31.
16. What is the information that the Receiver had before it at the time? Despite extending the bid deadline to October 26, the Receiver had nothing from Acquamia to satisfy itself that Acquamia was a Qualified Bidder. It was an integral part of the SISP process (and a requirement for the Receiver) that an auction be conducted only if the participants met that criterion and complied with the other terms of the SISP.
17. I do not accept Acquamia's argument that there was an amendment of the SISP's deposit requirements. The Receiver required the deposit to satisfy itself that Acquamia was a Qualified Bidder, given the unsatisfactory documentation that had been provided as to its financial capability to do the deal. The Receiver was entitled to do so based on the provisions of s. 7 of the SISP set out above.
18. Mr. Caserta's evidence is that Sincere did not want to make the deposit because it was concerned that the Receiver would change its process on a whim. There is no basis for that statement. If Acquamia had the funds in hand, there was no reason that it could not have made the deposit by October 26.
19. With respect to the information about the CDs to be lodged by November 26 and the \$1 million deposit by Monday, this is all information tendered after the bid deadline of

October 26. It was not information that was before the Receiver at the time. Moreover, even if I were to consider it at this point, the information does not amount to any sort of commitment on the part of Acquamia.

20. With respect to the argument that an \$18.1 million bid is superior to a \$13 million one, that is exactly what the court approved process was to allow for – to see if there were any bids that were superior to the stalking horse bid. However, the process had to be followed and the Receiver satisfied that there was indeed such a bid from a Qualified Bidder. As noted, despite the Receiver working with Acquamia and extending the terms, Acquamia did not satisfy the Receiver that it had the funds and could be considered a Qualified Bidder.
21. Acquamia is now trying to reopen the process after the fact, with information about financing that itself is still uncertain.
22. The Receiver recommends the 275 bid as set out in paragraph 25 of its Second Report. That bid exceeds the liquidation value of the assets. The transaction contemplates a going concern sale and retention of employees. The sale process was conducted pursuant to court order and sufficiently canvassed the market.
23. Considering all of the evidence before me, I am satisfied that the *Soundair* factors have been met and that the AVO should be granted. I am also granting the fee and activity approval order.
24. I have signed the two orders and attach them to this endorsement. The orders are effective on today's date and are enforceable without the need for entry and filing.



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Justice Conway

Released: November 12, 2021