

ISSUES

One should consider in buying or selling a business.¹

- Tax issues
- Capital requirements
- Business Vehicle
- Location
- Timing

Asset Buy/Sell Agreement considerations:

1. What are the assets to be acquired, these may vary, but you have to know what you are buying: Equipment, office equipment, machinery, jigs, related to the Operations, inventories of raw material, finished goods, work-in-process acquired in the ordinary course of business and pertaining to the Operations, rights with respect to (i) uncompleted contracts for the sale of goods arising from the Operations and entered into in the ordinary course of business; (ii) vendors' uncompleted obligations to provide goods or services related to the Operations; and (iii) any other purchase order, quotation or other item with respect to which Seller has assumed an obligation assignment of rights to insurance policies shall leases of the real estate proprietary information, intellectual property, insurance policies, books, records and documents related to the Operations, including, without limitation, trade secrets, know-how, drawings, vendor lists, manufacturing documentation and processes, blueprints, patents, licenses, books and records, customer lists, trademarks and trade name, computer programs and software (to the extent transferable), telephone and fax numbers related to the Operations, etc.
2. What is Excluded in the transaction. It is better to be specific. Consider: claims for refunds of taxes and other governmental charges for periods ending prior to the Closing Date, cash or cash equivalents existing on the Closing Date, capital stock in Seller, Seller's tax records, prepaid deposits or expenses, accounts receivable.

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3. What liabilities do you assume: You may not wish to assume any of Seller's liabilities except (i) obligations for completion of those contracts for the sale of goods which arose in the ordinary course of business of the Operations and were either: identified; or are identified on the Closing Date pursuant to agreement and are acceptable to, or have previously been approved; (ii) Seller's accounts payable incurred and unpaid in the ordinary course of business and which relate to the Operations, together with earned, but unpaid, agent's consultant's or distributor's commissions relating to the Operations ("Accounts Payable") and the accrued and unpaid vacation pay of any of Seller's employees who are employed by Buyer after the Closing ("Vacation Pay") to the extent, but only to the extent, that the sum of the amount of such assumed Accounts Payable and Vacation (iii) obligations under outstanding written quotations, purchase orders, and commissions

4. One should identify what liabilities the seller will retain, such as: Any costs, liabilities, expenses or obligations of Seller arising out of, being attributable to or occurring in connection with, the sale including, but not limited to, any counsel fees, accountant fees, sales taxes, brokers' or finders' fees or liabilities attributable to non-compliance with the Bulk Sales or any similar act, except with respect to the Accounts Payable expressly assumed by Buyer, any federal, state or local taxes imposed by reason of the sale, federal, state or local taxes of Seller, whether current or deferred., costs, expenses, obligations, debts or liabilities incurred by Seller prior to or after the Closing Date, liabilities whether for damage to persons or property otherwise arising out of, being attributable to or occurring in connection with the conduct of the Operations including, but not limited to, liabilities arising out of, being attributable to or occurring in connection with (i) products manufactured, distributed or sold by Seller, or services provided by Seller, prior to the Closing Date or claimed defects in or warranty claims respecting the-same; (ii) any violation of any laws, rules, regulations and orders (including, without limitation, any zoning, use, pollution, environmental, sanitation, safety or health laws, rules, .regulations and orders) occurring or arising out of any state of facts in existence prior to the Closing Date; and (iii) with respect to contracts or obligations assumed by Buyer, any liabilities arising from any action where Seller should have acted otherwise, or any improper or negligent action or omission by Seller which materially contributed to such contracts or obligations being breached, liability or obligation to any present or past employee of Seller's or any of Seller's predecessors, including, without limitation, any accrued vacation or sick leave pay, severance pay, unreimbursed employee expense or liability or obligation under any employee benefit plan subject to "ERISA" which was or is established or maintained by Seller, any former or existing subsidiary of Seller, environmental liabilities, associated with or arising from Seller's activities prior to the Closing, the Operations prior to the Closing or the condition of the Real Estate prior to Closing or the presence of any solid waste, hazardous waste or other contaminants on or below the Real Estate or elsewhere prior to Closing, accounts payable, liabilities, expenses or obligations arising from or relating to claims asserted by third parties to the extent

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that such claims arise from a failure to obtain such third party's consent to either (i) Buyer's assumption of obligations owed to such third party by Seller; or (ii) Seller's assignment to Buyer of rights which Seller had with respect to such third parties, liabilities arising from the terminations of agency, distributorship or other such agreements other liabilities or obligations of Seller which are not expressly assumed by Buyer.

5. How much will you pay and when and how will you pay it:
6. Are there deductions from the purchase price because of Vacation Pay, Accounts Payable, what about advance excessive billing prior to closing, reduction of inventory prior to closing?
7. What continuing certifications and warranties are desirable?
8. Are there post closing adjustments?
9. Are there dispute mechanisms- such as referral to binding arbitration.
10. What are the concise and necessary definitions of terms in the agreement?
11. What are the documents required for conveyance, transfer, assumption, assignment. What needs to be recorded and where is it to be recorded.
12. There should be a requirement that both parties remain obligated to and will, upon the request, take any and all steps reasonably necessary to place the each other in the position as contemplated by the agreement and to execute, acknowledge and deliver all such further acts, deeds, assignments, transfers, conveyances, powers of attorney or assurances as may be reasonably required.
13. The date and time of closing must be specified and consequences for breach spelled out.
14. What are the warranties of the seller and buyer, what are the remedies for breach?
15. Are government approvals required? Who will secure them?
16. Are there Brokers involved? Who pays them?
17. Are public announcements permitted, when and who will make them?
18. Are there Conditions precedent to the obligations of the purchaser and seller, that is, a back door out of the deal?
19. How and for what reasons may one party terminate the transaction?

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20. What warranties survive closing? What is the remedy for breach?
21. What is the procedure to seek indemnification or enforcement of post closing warranties or breach?
22. Who has access to books, accounts, records, property prior to closing.
23. What confidentiality agreement is in place for pre agreement, post agreement and post closing time periods.
24. Is there a choice of law, or choice of dispute resolution in place?

This is intended to be a non exclusive list of considerations in the purchase of a business using what is known as “an asset sale” where only assets are purchased. If one contemplates a “stock sale” where corporate stock is sold, then many new considerations come into play, including a increased level of due diligence and disclosure and warranty requirements.

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