THE JOURNAL RECORD

# Gavel to Gavel: First steps in buying or selling a business

**By: Steven G. Heinen Guest Columnist January 4, 2017 0**

Acquiring or divesting an existing business is a complex endeavor that requires considerable planning and analysis by both the seller and the buyer to protect their respective interests.

When considering this type of transaction, the buyer and seller typically take three important preliminary steps before executing a definitive purchase and sale agreement: negotiating and executing a non-disclosure agreement, or NDA, negotiating and executing a non-binding letter of intent, or LOI, and conducting due diligence.

An NDA is an agreement in which one or both sides agree to keep sensitive information provided by the other party confidential. The NDA should, at a minimum, define what constitutes confidential information, permit the receiving party to use such information only for purposes of considering and evaluating the proposed transaction, provide for the return of such information if the proposed transaction is not completed and address remedies for a breach of a party’s obligations under the NDA.

An LOI (also commonly referred to as a term sheet) outlines the main business points and expected timeline for a proposed transaction. An LOI usually will expire if the proposed transaction is not completed by a specific date and may provide for payment of earnest money to demonstrate the buyer’s commitment to pursuing the transaction.

LOIs are typically non-binding as to the proposed transaction, but often include binding provisions relating to exclusivity (the seller will not entertain offers from other potential buyers), non-solicitation (one or both parties agree not to solicit the other party’s employers and/or customers) and due diligence.

Due diligence simply means to conduct an adequate investigation. For the sale or purchase of a business, due diligence entails giving the buyer access to the seller’s premises, files and personnel in order to properly evaluate the business. The extent of access will depend upon how much information is publicly available, the sensitivity of the information, the degree of commitment of the parties (did the seller grant exclusivity to the buyer or did the buyer pay earnest money?) and whether the parties are competitors.

Buying or selling a business is an important and often complicated process, so it's important that both parties consider the risks and desired timeline, and involve their counsel, as soon as possible. Proper planning at the beginning of the process will facilitate completion of the transaction while protecting the parties' interests.

*Steven G. Heinen is a shareholder with GableGotwals.*

http://journalrecord.com/2017/01/04/gavel-to-gavel-first-steps-in-buying-or-selling-a-business-opinion/