Asset Purchase Agreements – Important Asset Provisions to Consider

As your business continues to grow, purchasing and selling assets in bulk may become a necessary tool to increase the overall strength of your company. You may find yourself reviewing an Asset Purchase Agreement ("APA") for buying or selling a particular set of assets. At its core, an APA is exactly what it sounds like: an agreement to purchase or sell specific company assets. These assets can take many forms, including inventory, equipment, customer lists, receivables, rights under the seller's contracts with third parties, or the entire group of assets associated with an on-going business. The length and sophistication of an agreement often depends on the parties and assets being sold. Having a basic understanding of the primary components of an APA will go a long way in determining agreeable terms.

This article focuses on some of the most underappreciated components of an APA: the provisions that relate to the "assets to be sold." While this may sound like a simple and basic term, there are actually several provisions within an APA that affect the assets being sold. A list of assets often excludes critical items that are necessary for the proper transition of the purchased assets. For example, if you purchase a sophisticated piece of equipment that requires in-house maintenance, it is important that the list of assets to be sold include any manuals, guides, or schematics. If these are not included in your APA, you may find it difficult to motivate a seller to retrieve those documents for you after the purchase. As a purchaser, you also want the seller to convey any rights the seller has under warranties made by the third party who sold that asset to the seller. When reviewing the assets to be sold, it is important to review every asset for any "ancillary" items or documents that may be needed to properly use or maintain the assets, and request that any omitted ancillary items or third party warranties (even if described only generically in the asset list) be included among the list of assets.

Your APA should also address the possibility that some of the assets being bought or sold may "change" during the gap between the date on which the parties agree to a price for the assets and the date the seller conveys and the purchaser pays for the assets. The assets that most commonly change during this gap are receivables and inventory. Your APA should therefore provide for an audit on the day of or prior to closing, with adjustments in the purchase price to account for any change in value. On a grander scale, it is important to have provisions in the APA about who bears the risk of loss and how the purchase price is to be adjusted in the event a casualty or similar event occurs after the parties have entered into the APA but before the closing.

Other important sections include those that address any liabilities, obligations or warranties associated with the assets. For example, if among the assets purchased are items that a buyer intends to resell to the public, the buyer may – by operation of law -- be assuming certain liabilities associated with those assets, particularly as they relate to implied warranty claims. In many sales, sellers seek to limit their liabilities by disclaiming warranties and selling assets "As-Is." In other transactions, however, the liabilities and warranties can be quite extensive. The parties may want to reflect in the APA and the asset transfer documents that the purchase price reflects the liabilities assumed and warranties being made – or the parties' disclaimer of those things. Indemnification provisions – which shift the risk of loss related to the assets conveyed in the event a third party makes claims related to the assets – are also related to the parties' assumptions and disclaimers of liabilities in the APA. Because indemnification provisions can expose a business to liability for something for which the business otherwise would not be responsible, it is important to request legal advice if a party is unsure about the effect of an indemnification provision.

Provisions dealing with the parties' representations must also be reviewed with a critical eye. The representation provisions outline what a party knows (or should know) and is representing about the transaction or assets being sold. This sounds simple, but Texas case law has severely limited the extent to which commercial parties can rely on representations made in a contract in the event those representations prove to be false. In addition to conducting the necessary due diligence about the assets being purchased or sold, it is important for parties to use the appropriate language in connection with the representations being made, to protect against potential issues in the future.

This article does not encompass all the important considerations related to assets being purchased and sold under an APA. A basic understanding of the relevant sections will go a long way, however, towards facilitating negotiation of these issues in developing appropriate documentation for buying and selling assets. By understanding these provisions, a party can speak with a legal advisor with clearer and more precise goals in mind. ©