BUYING-SIDE PREPARATIONS FOR AN ACQUISITION

It is often overlooked that the "buyer" of a company's assets or stock has just as much of a selling job to do as does the seller company, especially for a highly desirable company. Additionally, most deals (that are not purely desperation financial deals) that fall through at or before closing are caused by: 1) the seller "re-falling-in-love" with the company now that it has been "cleaned-up" for sale and either changing his mind about selling it or raising the price to an unrealistic level; or, 2) the deal getting to the point of closing and the buyer being unable to bring adequate financing to the table in a timely fashion.

To address the two points related to the purchase of a company (i.e. making the "sale" to the seller so that the Owner feels it is the "right thing to do" and adequate timely financing) as well as controlling the normal necessary actions involved in making an acquisition of a company, its assets, its technology, its facilities, its equipment, etc. the following program outline is recommended.

1. Creation of an Acquisition Summary Business Plan

    a. Summarize present state of the buyer's company, what makes it successful (specifics, not generalities), and what is needed for the next level of growth/profitability (people, technology, equipment, market-share, etc.).

    b. Identify what kind of "target" company would have the right market & customers, desirable employees and management culture, state-of-the-art technology (or "missing technology" in the buying company), and equipment or facilities or location.

    c. Identify any known "target" companies as "test cases" to perfect the "story-line" and create a sample package.

2. Creation of a "Sales Presentation" package appropriate to be given to the Owner or key person of a "target" company who has a "non-desperation" reason for selling the company (i.e. no heirs, no non-family potential executives, retirement of Owner, sale by Estate after Owner's death) that addresses the strengths of the buying company, how the "target" company and/or its people/assets will "fit" into the organization or be given the chance to continue on its own.

    a. Assuming that the "target" company is profitable (or at least at break-even, becoming profitable when Owner benefits are removed or modest funding is provided) and sustainable, the Owner needs an emotional reason, as well as a financial reason, to commit to the sale. Many times the company represents the Owner's life's work and an important component of the emotional issue is to leave the company and its key employees in good hands.

    b. If the "target" company is in desperate straits (i.e. headed for bankruptcy, insolvent, rapidly losing market share, obsolete technology/products, engaged in, or threatened by, massive litigation, or other existence-threatening circumstances), a more focused and hard-nosed version of this approach must be used and (usually) requires the help of a third-party turn-around specialist.

    c. Create a Plan A and a Plan B to cover whether, or not, the Owner desires to stay involved with the Company in whatever his/her specialty is. Regardless of how the buying company feels about it, this may make or break the deal or cause it to come "unglued" after the fact if not properly addressed, understood by both parties, and built into the Purchase Agreement.

3. Create a sales/cost/profit version of the Summary Business Plan (estimated as of "after" the acquisition) to be used with banks, investors, boards of directors, or any other source of funds or of permission to use

funds for the acquisition and/or it subsequent operation and to be used in conjunction with the actual implementation of the results of the acquisition.

a. This Plan should show the cost and milestones to integrate the new company and/or its assets, technology, employees, etc. into the existing company's operations (or to set up and operate a separate subsidiary company) and the expected resulting growth in sales and profits.

b. This Plan should be shown to key bankers, investors, and others to whom the company will look for funding – even if the acquired company is expected to "pay its own way – so that a general financing commitment can be obtained subject to the due diligence.

c. This Plan must be kept current as negotiations are on-going with different "target" companies since it will become the basis for integrating the acquired company or its assets and employees into the existing buying company.

4. Develop a strategy and budget for identifying "target" companies based on the criteria outlined in the Acquisition Strategic Plan.

   a. Use of already known information about competitors and industry players.

   b. Use of an M&A broker or M&A attorney.

   c. Use of purchased industry or professional society lists based on SIC/NAICS and other codes and product/service descriptions.

   d. Use of Public Records and Internet Research

5. Developing strategy for approaching "target" companies, once identified.

   a. Determine interest and/or availability and reason for interest/availability.

   b. Determine "key person" (i.e. Owner, Executive, or Shareholder) to be approached and best way to make that approach (may depend on how "target" company was identified).

6. Execute the strategy to "sell" the buying company to the key person at the "target" company and to sign a Letter of Interest to begin negotiations.

   a. Execute Confidentiality and Non-Disclosure Agreements and a "hold-still" agreement to set a time limit of exclusive discussions.

   b. Hold meetings with key persons leading to confidential data/information exchanges.

   c. Negotiate Term Sheet binding only as to confidentiality, specific terms, time of exclusivity, and price (or price formula), all contingent on due diligence results.

   d. Perform due diligence regarding any representations made by the "target" company or questions asked by the buying company, including: sales, costs, profitability, contracts and licenses, assignability or non-assignability of orders, contracts, or licenses, Intellectual Property and its protection, status of key employees and/or vendors, pending or feared litigation, employee or ex-employee litigation or claims, insurance claims/disputes, and other things pertinent to that industry and marketplace or technology.

i. Separate, but equally important, the culture of the “target” company must be accurately determined to make sure there is a “fit” with the buying company. This is the most difficult part of a due diligence but incompatible culture is very often the cause of failure or poor performance of an acquired company, product-line, technology, or infusion of employees.

ii. At least one member of the due diligence team should not be a buying company employee or should be an employee with proven ability to independent and honest on hard questions and should be tasked with the comparison of the two cultures.

e. Hold finalization meetings to discuss/negotiate due diligence findings and to finalize Term Sheet for use by attorneys in drafting the Purchase Agreement.

f. Develop Purchase Agreement package, including representations, warranties, and indemnity provisions, to be reviewed by the “target” company and differences notes and negotiated.

7. Hold legal closing.

8. Begin implementation of the Acquisition Business Plan, including but not limited to:

a. Internal and Public announcements to employees, vendors, customers, licensors, licensees, agencies, trade associations, etc.

b. Technology and Intellectual Property transfer and Employee and Independent Contractor transfers and assignments;

c. Assignment or Novation of Customer and Vendor contracts, sub-contracts, purchase orders, etc., including dealing with overlaps and duplications of buyer’s own vendors and subcontractors;

d. Consolidation of facilities and personnel locations, if any, and the termination or lay-off of excess personnel and/or independent contractors;

e. Immediately begin examining and working on integrating the new personnel into the existing company’s culture - generally speaking, a “good” first year of an acquisition including good things and tough things, will go a long way towards maximizing success of the venture; and,

f. Other items identified in the Acquisition Summary Business Plan or during the course of negotiations, due diligence, closing, or merger implementation.