

Asset Purchase Agreements

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In recent years, there has been a rise in the purchase and sale of nurseries and landscaping businesses. Consequently, lawyers such as myself have been retained either by the Seller or Buyer to represent them in these transactions. The key document involved in these buy and sell arrangements is the Asset Purchase Agreement. That Agreement will cover all the business assets owned by the Seller and sold to the Buyer in the transaction.

Whether you are the Seller or the Buyer in this type of transaction, here are some pointers for you to keep in mind when reviewing an Asset Purchase Agreement.

- 1. Recitals** - The Seller and Buyer should be clearly designated and the essence of the transaction clearly stated, i.e., what the Seller specifically desires to sell and what the Buyer substantially agrees to purchase.
- 2. Definition of Terms** - The typical Agreement contains a host of legal terms and legalisms which will keep the lawyers in business, but is Greek to the average person. These terms should be defined right up front in the Agreement so that the average person can understand them, i.e., hazardous substance or inventory.
- 3. Purchase and Sale of Assets** - What assets are being sold should be clearly spelled out in the Agreement. For example, assets may include real estate, buildings, equipment and inventory, licenses and authorizations, business agreements, trade names, patents and copyrights, accounts receivable, work in progress, business records, and any cash funds belonging to the business. Normally, the assets will be transferred on the date the Agreement is signed.
- 4. Purchase Price and Payment** - Both Seller and Buyer will be keenly interested in the agreed upon purchase price of the business and what conditions are attached to the purchase price. Will it be a completely cash transaction, a long-term loan, a promissory note, a mortgage agreement, or some mixture of cash and credit? In the Agreement, the purchase price should be allocated among the assets. This allocation may affect the tax treatment of the parties.
- 5. Non-Competition Agreements** - Contemporaneous with the execution of the Asset Purchase Agreement, the parties will often enter into a non-competition agreement where one party agrees not to compete for a period of time and in a certain geographic area in the other party's business. Often the non-competition agreement will be set out in a separate document. If either party fails to comply with the terms and conditions of the non-competition agreement, then the aggrieved party can seek a temporary restraining order, a preliminary injunction, or similar injunctive relief and monetary damages from the party who breached the non-competition agreement.

6. Liabilities - It should be spelled out in the Agreement what liabilities the Buyer is assuming, including any payroll liabilities, tax liabilities, contractual liabilities, etc. It should also be noted that the Seller remains responsible for discharging any remaining liabilities and obligations not specifically assumed by the Buyer. Usually, the Buyer will not assume responsibility for any personal injury or property damage claims arising before the Agreement is signed. However, the prudent Buyer should confirm that he/she has adequate insurance coverage if any claims do arise.

If some or all of the employees in the business are hired by the Buyer, it should be stated in the Agreement that the Buyer will be responsible for all wages, sick leave, vacation time and other employee benefits arising after the Agreement is signed.

7. Closing - The Agreement should specify what additional documents the parties need to bring to the closing. If the Asset Purchase Agreement depends on the execution of other documents, those documents should be reviewed by the Seller and Buyer in advance so that they can be executed contemporaneously with the Agreement.

8. Representations of Seller - Since the Seller is getting the money in this transaction, it is usually incumbent on the Seller to provide certain representations regarding the truthfulness of the financial statements, whether all licenses and authorizations have been paid, the status of the equipment and inventory being sold, whether the real estate is free of any claims or liens, the absence of any liabilities or litigation against the business, and the absence of any employees' problems affecting the business.

9. Indemnification Between Seller and Buyer - Despite the best intentions between the Seller and Buyer, sometimes a third party will intervene with a lawsuit to prevent the transaction or make a claim against the Seller and/or Buyer after the Agreement is signed. Consequently, indemnification agreements between Seller and Buyer are sometimes drafted to defend against these third party suits. Also, disputes arising between the Seller and Buyer can often be expeditiously resolved by drafting an arbitration clause in the Agreement.

10. Miscellaneous Provisions - Some provisions that either the Seller or the Buyer may insist upon include the assignment of rights to others, formal notifications regarding any claims, and listing all schedules and exhibits as part of the Agreement. No verbal understandings should be recognized by the parties unless they are put in writing.

11. Financing - Often, the transaction will come to an abrupt halt if the Buyer cannot obtain suitable financing to close the deal. The financing terms should be set out so that both parties know what type of financing the Buyer is seeking. An absolute final date that the Buyer has to obtain financing should be specified. If the Buyer fails to obtain suitable financing by the specified date, the Seller is free to sell the business to another party.

Good luck!

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