

Polymer TransAction Advisors, Inc.

Preemptive Bidding During The Selling Process

- I. **GENERAL**-Preemptive bid are sometimes employed by a potential business acquirer as a tactic to eliminate the risk associated with any possible competitor for the acquisition. A preemptive bid may be proffered by a potential buyer at any time during the selling process. Preemptive bids may be offered By the Buyer during one on one private conversations with a Seller **OR AT ANY TIME** during a competitive bid procedure.
- II. **FEATURES OF A PRE EMPTIVE BID**
 - a. Normally contains a purchase price that is attractive enough to incent a business seller to accept the bid.
 - b. Normally requires the seller to accept an exclusive right to negotiate-often called a “stand still” provision-in exchange for receiving a higher price. This provision prevents the seller from considering the sale of his Company to another entity during the life of the “stand still”-normally with a duration of 45-90 days. Typically, Buyer and seller agree to a duration of 60 days or less to be extended only by mutual agreement.
 - c. Normally contains more limited “walk away” language than a typical Indication Of Interest (“IOI”). These are typically the ability to walk away due to a “material adverse change in the condition of the Business”-ie. loss of major customer, economic change, death(s) of key employees, books and records are substantially different than what is contained in the Memorandum, and final board approval (but not to be unreasonably withheld).
 - d. Provides a target closing date.
 - e. Provides a list of key due diligence items remaining that may have an impact on price and closing.
 - f. Contains an expiration date which provides a limited time to review and consider-typically 48 hours to one week only-after which it is withdrawn.
- III. **WHAT THE SELLER MUST CONSIDER IN EVALUATING A PREEMPTIVE BID (note that many of these points must also be considered in any proposal)**
 - a. Is the bid near or at the likely market price for a comparable Business?
 - b. Is the tax structure acceptable? If an asset purchase proposal, does it contain a “make whole” provision for the seller to obtain the same after tax proceeds as he would under a stock purchase transaction?
 - c. Does the proposal contain limited “walk away” provisions to warrant acceptance?
 - d. Are the next steps re: key due diligence items and the target closing date acceptable?
 - e. Are other key terms (as are usually listed in an Offering Memorandum) acceptable?
 - f. Is the proposal acceptable in view of other interested parties and their likely proposals?

Polymer TransAction Advisors, Inc.

- g. For financed transactions what is the source of financing and what are the payment methods to be employed if the transaction is not an all cash transaction-i.e. what layer of conditionality does the proposal contain, if it includes a financing provision?
- h. What are the general provisions made for hold backs, escrows and indemnification?

IV.

WHAT A BUYER NEEDS TO DEVELOP A PRE EMPTIVE BID

- a. Information equivalent to that typically contained in an Offering Memorandum.
- b. A plant visit.
- c. Meeting with the Company's owners and/or top management.
- d. Selected additional information necessary to support a preemptive proposal.
This may vary based on the individual preemptive bidder, the type of buyer he is (strategic buyer or private equity group) his business strategy and synergy(ies) with the seller, and his perceived information needs.

Above all, the Seller must conclude that the proposal is attractive enough for him to assume the limited risk of entering into an exclusive right to negotiate for a limited period of time in the context of what he expects from other interested parties and the impact of breaking of discussions with them. Is the proverbial "bird in the hand" worth more than "two in the bush"?

The seller must also evaluate the credibility of the Buyer and his organization to complete the transaction, irrespective of the language of the Proposal.

Bmc:

PTA 3-2009