

Negotiating and Managing Complex Commercial Transactions

Confidentiality and M&A

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Situation

Confidentiality issues need to be addressed when conducting mergers and acquisitions with competitors or customers and suppliers.

Challenge

To come to an agreement, key information, such as technology, processes or pricing, needs to be understood by the parties involved, but such information includes important trade secrets, information that especially needs to be kept confidential from the party sitting across the table.

Action and Approach

Two recent transactions required the seller to share with prospective buyers key technology trade secrets to enable the buyer to properly value the business. In one case, these trade secrets were central to the key product line. In the other case, the key new development drove aggressive forecasts for the business. The buyer in both cases was a key competitor. The parties took two different approaches.

In the first case, the parties constructed an agreement that included the following:

- The seller provided representations about the undisclosed trade secrets including cost, uniqueness, movability of equipment used, ability to replicate the process at other locations and operating capacity.
- The buyer was not told the trade secrets nor was it allowed to tour the plant prior to the consummation of all closing obligations other than the payment of money.

- Immediately prior to the wire, the buyer was apprised of the trade secrets and given access to the plant. The buyer then had the option of walking away from the transaction, but only if any of the information it had just learned resulted in a breach of any of the seller's representations.
- In this case, the information did not violate the representations, and the buyer closed and was pleased with the new technology.

In the second case, the parties used a consultant to review the key technology that was under development.

- The consultant and outside counsel agreed to strict confidentiality obligations with respect to the new technology. They met with the buyer and reviewed the new project in detail.
- The consultant reported to the buyer, in general terms, on the new technology and its time to completion, quality of development process, likely market acceptance, existing and likely future competitors, and related topics.
- Ultimately, the seller was more pleased with its new development than the consultant. However, the consultant also thought the projections regarding the new technology were very conservative.
- Based on the consultant's advice, the buyer reached its own conclusion on forecasting for the new technology, discounting the seller's forecast by 10 to 20 percent.



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