

Preliminary agreements - the indicative offer

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An indicative offer usually involves the expression of an early offer or price that indicates what someone might be prepared to pay for a business or for specific assets.

These offers are indicative in the sense that they provide an indication only, and are not definite. They can be a useful tool early in a process to ascertain whether the vendor and purchaser share similar views on value and the key terms of a transaction.

Requesting indicative offers is one of a number of possible techniques to avoid surprises between potential transacting parties. They are used more frequently in sale processes, and can enable a vendor to identify one or more short listed parties with whom it is prepared to enter into ongoing discussions.

The hope is that the inclusion of an indicative offer stage at the beginning of a process will help the vendor (or its advisers) to differentiate between the serious and realistic potential purchasers, and the 'tyre kickers' who are shopping at bargain basement prices or are otherwise unlikely to be able to complete a deal.

Of course that can be easier said than done, and when it comes to the crunch the content of any indicative offer needs to be thought about carefully. There is no 'one size fits all' and each indicative offer will ultimately reflect the specific party's interest in the transaction, and its requirements in terms of process, conditionality and exclusivity.

Any potential purchaser should focus on making its indicative offer as attractive as possible, with a view to standing out from other parties in a process. A well structured indicative offer, while remaining largely non-binding in terms of actual purchase commitment, will demonstrate to a vendor that the purchaser has a clear ability to transact at an attractive price (or within a rational price range), is realistic in terms of due diligence and process, can satisfy conditionality as promptly as reasonably possible, and has the financial wherewithal and ability to complete a transaction in a timely manner.

So what would you generally expect to include, or consider including, within an indicative offer?

Key terms of indicative offers

- **A clear expression of the purchasing entity:** Any offer should identify the full details of the offeror's purchasing entity, including where it has been established or registered and whether it is of substance. Where the entity is yet to be formed, a summary of timing for proposed establishment should be included.
- **What the offeror is seeking to acquire:** The description of the business or assets that the offeror is looking to purchase should be clear and concise. If the offeror is looking to exclude specific assets or arrangements from the transaction that should usually be signalled upfront, especially if it is likely to be material to the overall arrangement.
- **The indicative price or price range:** The proposed indicative price or price range that the offeror is willing to pay for the acquisition should be clearly expressed. Where there may be a question mark over how the price has been formulated, or where further discussion may assist to justify the selected price or range, consider including a brief summary of the rationale for the price (assuming the rules of the process allow this). Any assumptions made by the offeror in formulating its price should also be spelt out.
- **Conditionality:** Any conditions relevant to the indicative offer should be identified. These will frequently include one or more regulatory or internal approvals that will be required for the offeror to proceed, a due diligence review (quite possibly legal, financial and commercial reviews), the conclusion of a legally binding agreement covering all terms and conditions, and possibly other conditions such as key employees moving with the target business.
- **Timing issues:** A summary of any material timing issues that relate to the offeror's ability to complete a deal may need to be included. Where the offeror is willing and able to move swiftly, that should be made clear because it is likely to be attractive to the vendor.
- **Due diligence requirements:** If the offeror has very few or limited requirements for due diligence, or if the offeror can move particularly quickly or intends to focus only on specific parts of the target business for its due diligence, then that

should be clearly stated because it may make the offer more appealing to the vendor.

- **Structural issues:** The offer may need to include a reference to any restructuring that will be required by the offeror, whether that is to take place within the offeror's group prior to the transaction being completed, or within the target as a condition of the proposed acquisition.
- **Expectations regarding formal documentation:** An offer will often make reference to the transaction documents that will need to be negotiated and finalised as part of formalising the transaction. It can be helpful for the offeror to signal one or more specific legal terms or protections that the offeror will require to be included within the documentation. If the offeror has an expectation of other parties signing transaction documents that should usually be signalled upfront.
- **Status of indicative offer:** Most (if not all) indicative offers will include clear wording outlining whether the terms of the offer are legally binding or not. Frequently, some parts of the offer may be intended to be binding and require agreement (for example provisions dealing with exclusivity and confidentiality), whereas other parts (particularly the offer itself and the indicative purchase price) are almost always expressed to be not binding. Normally reference will be made to the offer not constituting an offer capable of acceptance, and the ability of the offeror to withdraw prior to signing a final binding agreement.
- **Exclusivity:** If the offeror requires a period of exclusivity for completing due diligence and negotiating formal agreements (and has the leverage to require such exclusivity), the offer will need to set out the required terms and timing.
- **Confidentiality:** An offeror will usually expect its offer to be strictly confidential, and wording may be required to accommodate disclosures that will be needed as part of a sales process.
- **Costs:** Some but not all offers make reference to the responsibility of each party to meet its own costs associated with documentation. Specific cost sharing or reimbursement arrangements may occasionally be agreed as part of exclusivity arrangements. As expected, much depends on the leverage that either party holds in the negotiation.
- **Next steps:** Sometimes offers will conclude with a brief summary of what will happen next if the vendor accepts the indicative offer. A statement as to next steps and timing can be useful where the offeror is able to move swiftly. More frequently, the vendor's sales process will be run by a sales adviser who asserts greater control over process and next steps.
- **Governing law:** To the extent the indicative offer contains provisions that are legally binding, the offeror will usually specify the governing law and jurisdiction in case of any dispute.
- **Sign off / acceptance provisions:** An indicative offer should be signed by an appropriately senior person within the offeror's organisation or a parent company. The choice of the signatory can on occasion make a difference in terms of how the offer is viewed by the vendor. Where the expectation is that the vendor will (or may) accept the indicative offer on the stated terms and grant exclusivity or other legally binding rights, the appropriate acceptance provision with wording and a space for a counter signature should be included.

While conceptually, indicative offers sound straight forward, there is a big difference between a well worded indicative offer, and one that has not been structured so carefully. Clearly the objective of the offeror in any process should be to craft an indicative offer that positions it well for negotiations and enables it to stand out from the crowd in any competitive process.

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