

Buying a Business in Florida: The Purchase Agreement

by Gary Kauffman, Esq.

Buying a business can be complex. For an E2 visa candidate, your U.S. investment needs to satisfy both your *business* goals, as well as your *visa* requirements. Whether you're buying a large manufacturing facility or a small restaurant, it all begins with the Purchase Agreement – your roadmap for all dealings with your seller. This article will highlight certain issues to consider when signing your first Purchase Agreement.

1. Asset Purchase Agreement. Most buyers prefer to purchase a seller's assets, rather than stock or shares in the seller's company. This is done primarily to help you (the buyer) avoid acquiring your seller's debts and liabilities. Although some liabilities can be pursued against an asset purchaser (e.g., sales taxes), an asset purchase will shield you from most of your seller's creditors.

2. Due Diligence Period. In a typical Purchase Agreement, after signing the contract, you are given a period of time to evaluate the business. Perhaps you saw a financial statement that the seller prepared; but didn't see any underlying documents (e.g., check registers, tax returns). If possible, request a 30-day "due diligence" period. During this time, you can more carefully review the financials; inspect any business equipment, vehicles, or air-conditioning units; or review key contracts affecting the seller's business. You should have the right to terminate the agreement, during the due diligence period, if you are not fully satisfied with the results of your evaluation.

3. Purchase Price. The purchase price is always the most important issue. But it is not always prudent to pay the full amount upfront. Perhaps you're concerned that the seller's financials are over-stated; or that the seller's debts will become *your* debts; or that *customer retention* may be hard to achieve. One solution? Ask for a seller loan. For example, on a \$450,000 purchase price, but you might offer to pay just \$300,000 upfront, and give a Promissory Note to your seller for the other \$150,000, to be paid out over 3 years. This solves two problems – it helps to preserve your capital; and if anything goes wrong after the closing, it gives you leverage to withhold payments on the Note (e.g., if your seller misrepresented the financials).

4. Escrow Deposit. Most Purchase Agreements expect the buyer to deposit funds in escrow, pending the closing. This shows good faith to your seller, while you take 30 days (or more) for due diligence. Perhaps your seller asks for \$20,000 in escrow, to be applied towards your \$450,000 purchase price. But for an E2 visa candidate, some U.S. embassies may require *more* funds at risk; and your immigration attorney may suggest increasing your deposit to \$75,000. Be careful. A typical Purchase Agreement will say that if you (buyer) default in closing, the escrow agent must pay the deposit to the seller. If the embassy requires a higher deposit, then just make sure your seller gets *just* the original \$20,000 if you default, and *you* get back the other \$130,000. (Note: If you terminate a Purchase Agreement, during the Due Diligence Period, that is not a 'default', and you get back 100% of your deposit.)

5. Conditions. Consider whether you need any *conditions* to occur before you are required to proceed with buying the seller's business. For example, do you want the right to terminate the contract, if you are unable to (i) receive your E2 visa, (ii) get a bank loan for a portion of the purchase price, (iii) agree on terms for you to employ your seller, after closing, or (iv) sell your house in Germany, which funds may be needed to pay for the business. You should always ask for a *global* "due diligence" condition, where you can terminate for *any* reason. But consider also whether you need other conditions added.

6. Non-Compete. In your Purchase Agreement, be sure to provide for a Non-Compete Agreement. Even though this won't get signed until closing, be clear upfront. If you pay good money to buy a business, you don't want your seller competing with you. Perhaps ask the seller to not compete for 5 years, within a 30-mile radius of the business. The specifics will vary, depending upon the type of business.

7. Closing Costs. To ensure a smooth closing, a good Purchase Agreement will allocate the various closing costs, according to local custom. Between Buyer and Seller, who pays for (i) the landlord's cost (if any) to approve a lease assignment, (ii) taxes owed on any seller loan, (iii) releasing liens

and charges encumbering the business, or (iv) the closing fee charged by the closing attorney? All are negotiable, and should be addressed in the Purchase Agreement.

8. Receivables. In a typical Purchase Agreement, the seller retains all accounts receivable. But think about this. For your purchase, perhaps you do not want your seller having any contact with your customers, after the closing. If so, then consider providing a mechanism whereby you collect all receivables (and you either increase the purchase price a bit, or perhaps you take a *collection fee*, and remit the balance to your seller).

In summary, navigating a Purchase Agreement can be scary. For a first-time business purchaser, it is always best to work with an experienced attorney, business broker or other advisor (and also an accountant, for the various tax issues). While purchasing a business can be intimidating, it can also be rewarding. It can offer you new challenges, an opportunity to move to a new city, and to realize a new dream. Whatever your reasons, be sure to protect yourself before you sign your Purchase Agreement; but then, enjoy the ride!



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