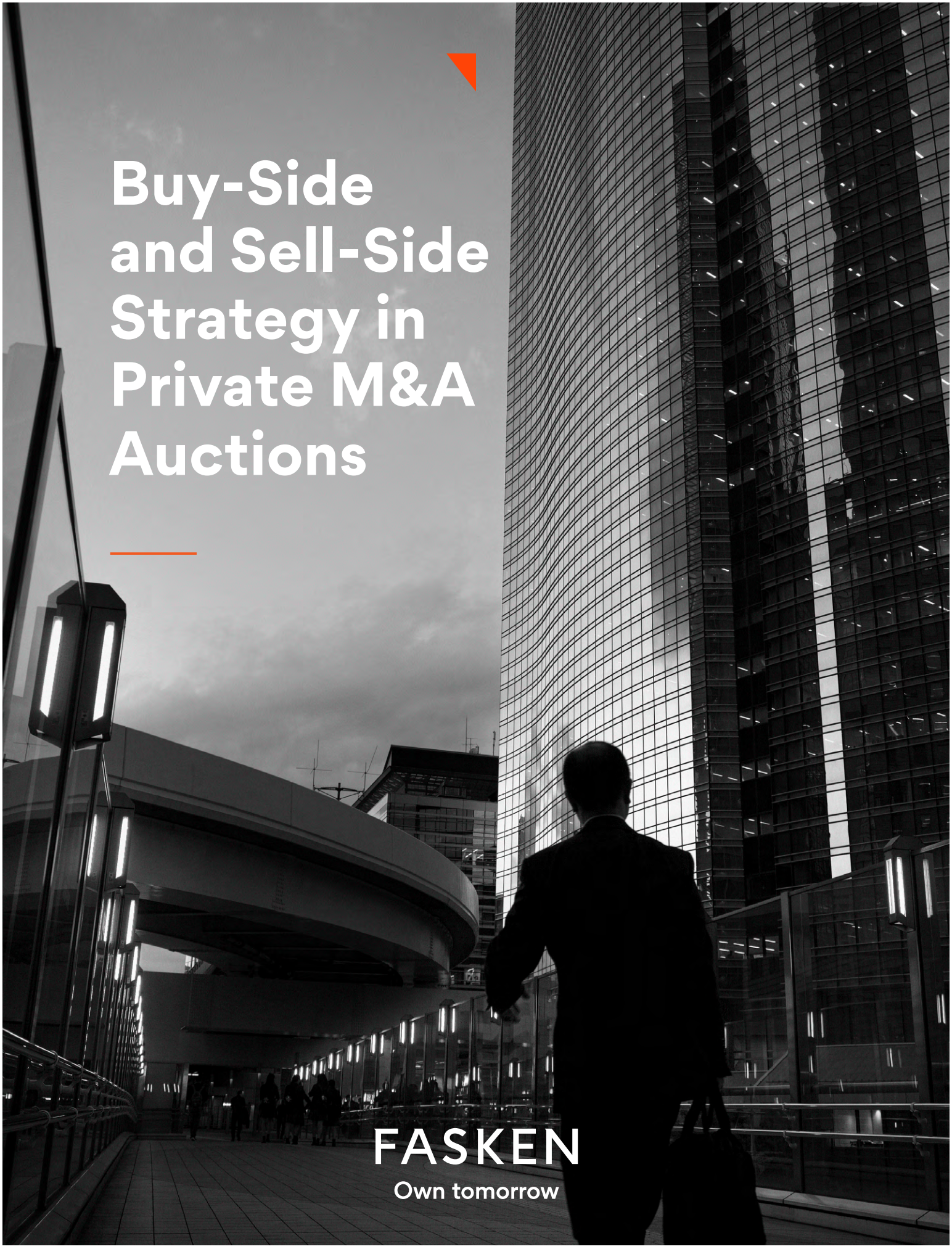
Buy-Side and Sell-Side Strategy in Private M&A Auctions



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1. Overview

Dealmakers know there's no "one size fits all" to strategy in private M&A auctions: every target, seller, bidder and sales process is unique. That said, sophisticated buyers and sellers will always get the basics right.

On the **buy-side**, savvy buyers know that, alongside competitive deal terms, *soft skills* will help win bids. We discuss some of these at a high-level. We focus on a bidder's approach to the (1) letter of intent (LOI), and (2) mark-up of the auction's form of purchase agreement (SPA).[1] We take the perspective of a private equity bidder (as opposed to a strategic). We also discuss the importance of signalling in founder sales.

In brief:

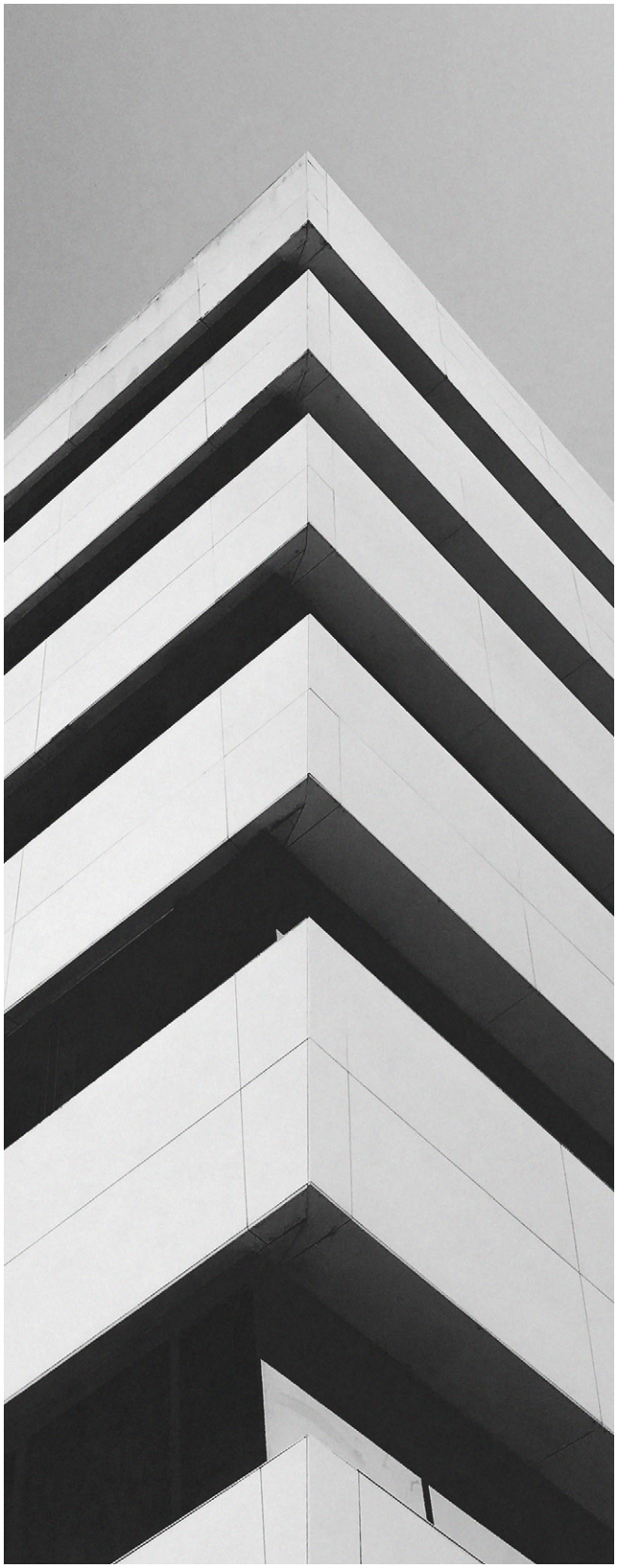
- An auction seller is looking for the optimal mix of purchase price + deal certainty. Deal certainty hinges on your credibility and ability to close quickly.
- Use the LOI to build seller confidence beyond bid price. Answer questions, don't trigger them. Find ways to "show your work". Cut a clear and quick path to closing.
- Keep your SPA mark-up boring, predictable and closeable. Stick to material points. Aim for RWI conformity. Work with the seller's draft.
- In founder sales, signal that the deal is the start of new growth, collaboration and partnership, and that the real (and much bigger) exit is the next one down the road.

1 For ease of reference, we refer to the auction form of purchase agreement as the SPA notwithstanding that some private M&A auctions will involve an asset purchase agreement.

On the **sell-side**, auctions are used to create competitive tension in pursuit of better deal value, deal terms, and deal certainty. The sellers' control over the auction's timing and process also allows them to plan and deploy a target and market-specific auction strategy. To help sellers exit successfully (i.e., exit big), we provide a *sell-side primer* on key deal points and preparation. We discuss:

- Confidentiality, the process letter and the draft purchase agreement.
- Evaluating bids and granting exclusivity.
- Sellers' alignment, rollovers, and restrictive covenants.
- Asset sales and carve-outs, reverse due diligence, and one-step vs two-step transactions.
- The sellers' representations and warranties (R&Ws), a "clean walk" vs indemnities, and representation and warranty insurance (RWI).

In both cases, our review is by necessity high-level and non-exhaustive. To discuss further, contact any Fasken partner on page 15 or any other Fasken M&A partner.





2. Buy-Side Strategy: Purchase Price, Deal Certainty and Soft Skills

An auction seller is looking for the optimal mix of purchase price + deal certainty. Part and parcel of deal certainty is the bidder's credibility and ability to close quickly.

Regarding deal terms generally, the typical seller's wish list is no secret. The question for the buyer is how attractive the target is and how competitive the auction is expected to be. Ideal deal terms to offer the sellers, as sophisticated bidders know well, would include:

- Minimizing closing conditions and any regulatory risk.
- Demonstrating bidder conviction through firm financing and investment committee (IC) or board approval vs merely indicating the availability of financing and that the bid remains subject to approval(s).
- Minimizing post-closing risk by offering a clean walk via a commitment to representation and warranty insurance (RWI) and a specific RWI policy provider and avoiding or minimizing (duration and cap) specific indemnities.

The LOI: Build Seller Confidence Beyond Bid Price

Convincing the seller that you offer the best mixture of price + certainty is, at its heart, a multi-faceted signalling exercise. This starts with clear and direct engagement with the seller's process letter.[2] In doing so, we recommend keeping three interrelated, softer goals in mind:

- **Answer questions, don't trigger them.** The LOI is a critical opportunity to demonstrate your sophistication, deal-readiness and appreciation for the seller's priorities. This is done by evidencing engagement and proving capability. Conversely, the use of qualifiers, instances of equivocation, or gaps in approach can quickly sink a bid. A few examples are illustrative. Be clear as to the core assumptions that drive your valuation; don't throw in the kitchen sink. Tackle proposed purchase price adjustments with precision and commercial sensibility. Clearly articulate structuring proposals and the rationale behind them. Have due regard for complex issues and establish technical credibility. Avoid sweeping diligence and other "subject to" qualifiers. Catch all material issues the seller would expect you to raise and address them head on. Driving by something important begs the question: what else did they miss?



- **Find ways to "show your work".** Approach the LOI much like a math exam: it's not enough to give the numerical answer, you should also show your work. This can be done directly as well as by implication. Identify your deal team and financial, legal and other advisors. Demonstrate that workstreams have been established and teams have been digging in.[3] Indicate (ideally) that you're ready to begin site visits (etc) and confirmatory due diligence. Don't submit a standard due diligence request list that isn't responsive or tailored to what's already been given in the auction VDR. Ask specific (not generic) questions aimed at material issues and risk. Show conviction in that you've hit the ground running. The due diligence test to getting exclusivity isn't whether you've done everything, it's demonstrating you've scrutinized key diligence issues and can put your money where your mouth (or rather, bid) is. Deploy enough front-end capital to be able to do these things. Yes, tout your deal-list and stellar track record and reputation. But don't rest on your laurels either.
- **Cut a clear and quick path to closing.** Lean on your front-end spend to isolate your do or die battles. Key here are any regulatory, competition or national security type filings that can add significant runway to close. This is also where a PE can often significantly differentiate itself over a strategic. Craft your closing conditions and other related deal points accordingly. Save your negotiation capital for your hills to die on and avoid any temptation to try to nickel and dime. Make your best financial offer and lean against proposing an earnout. Leverage your front-end spend to shorten your exclusivity period to the extent reasonably possible. Pre-empt points of concern apparent from the diligence materials and explain how you plan to resolve them. Demonstrate potential flexibility and openness to finding and accommodating creative solutions. Yes, balance competitiveness with sufficient flexibility to preserve critical deal optionality during exclusivity. But don't over-lawyer or leave any impression you haven't done your homework, might need more time, or might try to re-trade later.

2 As discussed in our sell-side primer, this will convey the sellers' specific expectations regarding bid content, including (1) price and consideration, (2) valuation methodology and assumptions, (3) financing arrangements and guarantors (equity and debt), (4) timing and scope of expected due diligence, (5) any bidder conditions, (6) any required or potential third party or regulatory approvals, and (7) the bidder's strategic plans post-closing, e.g., regarding key employees or relocation of operations.

3 Note – sellers will know the time spent by a bidder in the VDR, which sends a signal as to how serious a bid is and how much work has been done.

Working with the terms of the process letter when drafting your LOI is of course vital. But neither should these instructions be considered gospel in every case. Tactfully applied based on the circumstances, targeted and thoughtful deviation can work for a bid rather than against it.

The SPA Mark-Up: Keep it Predictable, Insurable and Closeable

Your mark-up of the auction SPA should be surgical. Think of your pen as a scalpel, not a saw. The emphasis should be on precision, avoiding volume, and signalling cooperation as opposed to confrontation. Examples include:

- **Issues List vs Mark-Up.** The process letter will often require a full-mark-up of the SPA. Whether this makes the most sense will depend on the seller's draft. Should it skew unreasonably seller-friendly, a targeted issues list focused on your five or six key issues may be better received than a heavy re-write of the SPA.
- **Stick to Material Points.** Avoid changes that don't move dollars or material risk. For commercial issues, these should generally be limited to (1) purchase price mechanics, (2) working capital adjustments, (3) baskets, caps and claim thresholds, (4) any escrows or holdbacks, and (5) any break fees, other financial terms and their definitions. For legal issues, the mark-up's focus should generally be narrowed to (1) closing conditions, (2) any key interim covenants, (3) bringdown standards, (4) indemnity structure, and (5) insurability.
- **Aim for RWI Conformity.** In RWI deals, revisions to the seller's representations and warranties should aim for insurability and not maximizing scope. Bespoke representations and warranties should be limited to value-critical items. The SPA mark-up should not be used as a substitute for diligence (i.e., "diligence by drafting"). Don't modify the seller's representations so as to require significant disclosure schedule information production that's not material to the deal.
- **Work with the Seller's Draft.** Mirror the seller's language and style in your changes. Avoid irritants; e.g., throw away your thesaurus. Don't simply cut and paste precedent. Use notes to draft (NTDs) sparingly and generally only for (1) commercial issues that go to purchase price or deal certainty, (2) addressing substantive legal issues or rationale, and/or (3) deviation directly connected to RWI insurability or diligence gaps. Wordsmithing will quickly raise red flags.

All in all, seasoned dealmakers and skilled drafters know where the rubber hits the road in M&A agreements; what really matters vs what's just window dressing. Serially successful buyers leverage this wisdom to keep mark-ups light while zeroing in on their key goals. They simultaneously signal to the seller that they're there to do the deal without distraction by points that don't go directly to value or risk.

Signalling in Founder Sales

Signalling will be especially important for a private equity buyer in the context of a founder sale. The underlying goal is conveying that the deal is the start of a new collaborative relationship and new growth phase going forward. In other words, the essential message is that the founder sale is actually the dawn of a partnership working towards the real (and much bigger) exit in a few years time. This should involve a clear blueprint as to your plan to grow the business. This can also include evidence of your track record, e.g., by details of past rollover returns and/or references from CEOs of the fund's other or historic portfolio companies.



3. A Sell-Side Primer: Optimal Strategy Depends on Context

Optimal sell-side strategy will vary from deal to deal. For example:

- Different considerations will arise depending on whether the target is a founder-owned company versus a later-stage private equity (PE) portfolio company.
- What are the circumstances of the sale? The target may be a premium asset attracting intense market interest. It may be a lagging asset at the end of a PE fund's lifecycle with investor pressure to sell.
- What types of bidders are expected? Strategics will typically be more focused on operational issues while PE will typically be more focused on valuation drivers and growth strategy. Different buyers will present different degrees of regulatory risk.

A threshold strategic question—typically developed in close collaboration with the M&A broker—is the "go-to-market" approach: whether to target a curated list of likely best-fit bidders or to cast a wider net across different buyer profiles (strategics, financial sponsors, and sponsor-backed platforms). A narrower outreach can preserve confidentiality, reduce disruption, and concentrate management time on the bidders most likely to deliver on price and deal certainty; it can also help avoid "process fatigue" and unintended market signalling if the asset is not ultimately sold. A broader approach can increase competitive tension and surface non-obvious buyers (including sponsor-backed companies with strategic rationales), but will need more careful process management, messaging discipline, and screening to ensure volume does not come at the expense of bid quality and execution risk.

The NDAs, Process Letter and Draft Purchase Agreement

The cornerstones of a successful M&A auction are the (1) auction non-disclosure and confidentiality agreement (NDA) with the potential bidders, (2) process letter, and (3) draft form of purchase agreement (PSA). Although very different documents, they share the same strategic goal: help the sellers to most efficiently and reliably identify the most promising bid(s).

Confidentiality Agreements (NDAs)

Confidentiality is a key sell-side consideration in an auction. An auction NDA typically imposes certain constraints beyond a standard NDA, e.g., prohibiting bidders from contacting other prospective bidders to guard against potential inappropriate bidder cooperation and non-solicitation provisions. The sellers must also decide how best to stagger its disclosure to bidders, e.g., because of the potential for a competitor to try to use the auction as a fishing expedition. This requires a balance between protecting commercially sensitive information, on the one hand, and the risk of depressing indicative offer prices by under-disclosure, on the other hand.

Process Letter

The process letter anchors an auction structure. It sets a clear framework for potential bidders, including regarding the timing and nature of bids (e.g., one or two rounds). It also communicates the sellers' specific expectations regarding bid content, including (1) price and consideration, (2) valuation methodology and assumptions, (3) financing arrangements and guarantors (equity and debt), (4) timing and scope of expected due diligence, (5) any bidder conditions, (6) any required or potential third party or regulatory approvals, and (7) the bidder's strategic plans post-closing, e.g., regarding key employees or relocation of operations. Acceptable deal terms should be circumscribed as narrowly as reasonably possible and the sellers' "must haves" should be clearly flagged, e.g., buy-side RWI.

Draft Purchase Agreement

A key advantage for sellers in an auction is that, unlike in most bilateral negotiations, the sellers control the initial draft of the PSA. Two main benefits follow. First, the sellers control the language that structures the transaction and the allocation of risk between the parties. Second, it gives the sellers another way to highlight those matters of greatest importance for a successful sale. This can be done directly, e.g., by identifying its preferred treatment of a particular regulatory issue. Alternatively, the sellers can flag an issue they will need the bidder to address, e.g., a footnote regarding the treatment of options and equity-based compensation. Issues flagged in the draft PSA can also indirectly signal the different types of bidders the sellers expect in the auction, e.g., a footnote speaking to potential regulatory issues (i.e., signalling strategic interest) or a footnote speaking to equity or debt commitment letters (i.e., signalling PE interest).



Evaluating Bids and Granting Exclusivity

Bids received should be evaluated holistically. Purchase price will, of course, be paramount. But significant value should also be given to a clear path to closing, i.e., certainty of funds and ability to execute. Even a significantly higher purchase price should not necessarily outweigh clear closing risk. In particular, closing risk associated with the likelihood of obtaining regulatory approvals (anti-trust and foreign investment) should be carefully considered at this stage. Similarly, even though the process letter required a mark-up of the draft PSA, the sellers should not necessarily discount a bidder who only submits a detailed issues list. The critical question is whether the bidder has demonstrated conviction and capability, e.g., through the meaningful engagement of expert advisors, close consideration of more complex deal points, and thoughtful attention to the sellers' key concerns.

Granting exclusivity to a bidder is another critical tactical point. The stage at which this will be strategically appropriate will depend in part on whether the process is a single round or multiple round auction. Selecting the bidder to whom exclusivity is granted is amongst the most important decisions sellers make, and this underscores the importance of assessing the bids received holistically. The sellers must also decide on the optimal exclusivity period. The greater the interest shown by bidders and the more advanced they are in the process (e.g., in terms of due diligence, financing, valuation and internal approvals), the shorter the exclusivity period often is.

While granting exclusivity to a bidder is not mandatory, it typically occurs and is generally a pre-requisite to additional spend and resource dedication by the bidder.

Alignment Among Sellers

If there is more than one "seller" party, alignment among the seller group is essential.[4] But this does not always exist. Disagreements can range from an acceptable floor price, whether to pursue a dual-track process, or whether to sell at all. The sale of a small start-up owned by a single founder should present no issues. The proposed sale of a later-stage target with a mixed shareholder group, e.g., angel investors, venture capital, PE and/or institutional investors, can expose potentially unexpected faultlines.

The terms of the target's shareholders' agreement should, of course, be determinative. However, these contracts can be poorly drafted or contain problematic veto rights, in which case such complications should be resolved before going to market.[5] Prospective bidders will be put off by apparent sell-side discord and the potential for a disorderly transaction.



4 An important practical consideration in the sale of a target with a wide shareholder base is whether a sellers' representative may be prudent. This is a single firm appointed to act on behalf of all selling shareholders to manage various post-closing issues, from administrative matters to potential disputes.

5 In some cases, consideration could be given to whether there is a sufficient group of aligned shareholders to pass the required resolutions for a court-ordered process.

Rollovers

The rollover and "reinvestment" of a portion of the seller's shares, and in particular, target management's shares as part of the transaction, can be of acute importance to the sellers, to a buyer, or both.[6] Where it's crucial to one or more sellers, this should be flagged in the process letter together with any post-closing governance expectations that those sellers may have. That said, management sellers should appreciate that meaningful governance rights or a refusal by key management to rollover and reinvest (or provide an initial investment as part of the transaction) could prove to be deal-breakers for certain bidders. Accommodating a bidder on governance issues that are important to them, by contrast, could lead to far more seller-friendly deal terms overall. Where rolling over is important to key sellers, this can weigh against bids by strategics and favour a sale to PE or a PE-backed company.

Where the potential for rollovers is foreseeable, sellers' due diligence of the buyer will need to be built into the sales process. This will include, at a minimum, such fundamentals as the bidder's capital structure and cap table together with appropriate buy-side R&Ws in the purchase agreement and/or other transaction documents. The sellers' evaluation of the bids received will also grow more complex given the sellers' equity stake going forward. The sellers' additional considerations should include, for example, (1) what the buyer brings to the table in terms of operational synergies, cross-selling opportunities, access to capital, etc., and (2) any foreseeable practical issues with the post-closing integration of the target into the bidder's wider operations, including as operational integration is often the decisive test of a whether a deal ultimately proves successful. Also, where rollovers are likely, tax advice should be sought as soon as possible, especially when the transaction involves a foreign (non-Canadian resident) buyer.

Restrictive Covenants

Whether or not rollovers occur, bidders may expect that sellers who have been instrumental to the target's success sign restrictive covenants, i.e., non-compete and non-solicit undertakings. Such a requirement may also be built into the target's shareholders' agreement (SHA).

Where restrictive covenants are a likely bidder demand, the sellers face a tactical choice: whether to volunteer restrictive covenants in the draft PSA or leave them for the bidder to raise. Pragmatism should prevail, and this will again depend on the context and sellers' profile. Different sellers within the same company may also warrant a different approach, e.g., robust restrictive covenants for higher management-level employee shareholders and no (or very limited) restrictive covenants for institutional and PE sponsors. As with the remainder of the draft PSA, including restrictive covenants in the PSA means that sellers' language serves as the default while the competitive tension of the auction may discourage material changes by bidders.



6 A rollover generally refers to a seller (often target management or a continuing equity holder) reinvesting a portion of its sale proceeds into the buyer's post-closing capital structure – for example, by subscribing for shares or other equity-linked instruments of the acquisition vehicle – rather than cashing out entirely. In many structures, the rollover is implemented so that the seller's disposition and reinvestment can occur on a tax-deferred (or partially tax-deferred) basis, subject to the applicable rules and the parties' ability to meet the technical requirements.

Asset Sales and Carve-outs

Assets sales and carve-outs are inherently more complex than share deals. As such, where an asset sale or carve-out is either the plan or a reasonable possibility, the sales process should be adjusted accordingly. Greater participation by operational personnel will likely be required. Bidders may require transitional services. Appropriate workstreams should be established early. Significantly more detailed sell-side due diligence – including carve-out financials – may be required before going to market. Bidders can distinguish themselves through a well-considered asset transfer strategy, including as relates to reducing closing risk.

Sell-Side Due Diligence

Varying levels of sell-side due diligence by the sellers of their own business prior to commencing an auction process may be prudent. This should be conducted in parallel with preparing the draft PSA, its R&Ws, and its disclosure schedules prior to the process.

The goal is to be proactive rather than reactive in addressing deficiencies that could disrupt a smooth sales process and to avoid unpleasant surprises and/or delays. For example, the sale of a manufacturing business may require a new phase 1 or phase 2 environmental site assessment, which would be better to complete prior to initiating the process. The sale of a tech company may require addressing IP assignments by key employees or contractors. In addition to informing the auction PSA, sell-side due diligence can assist in organizing and populating the virtual data room (VDR). A well prepared VDR contributes considerably to a bidder's overall impression of the target. It can also significantly reduce transactional fees and save time during the sales process (when there will already be abnormal demands on target management).



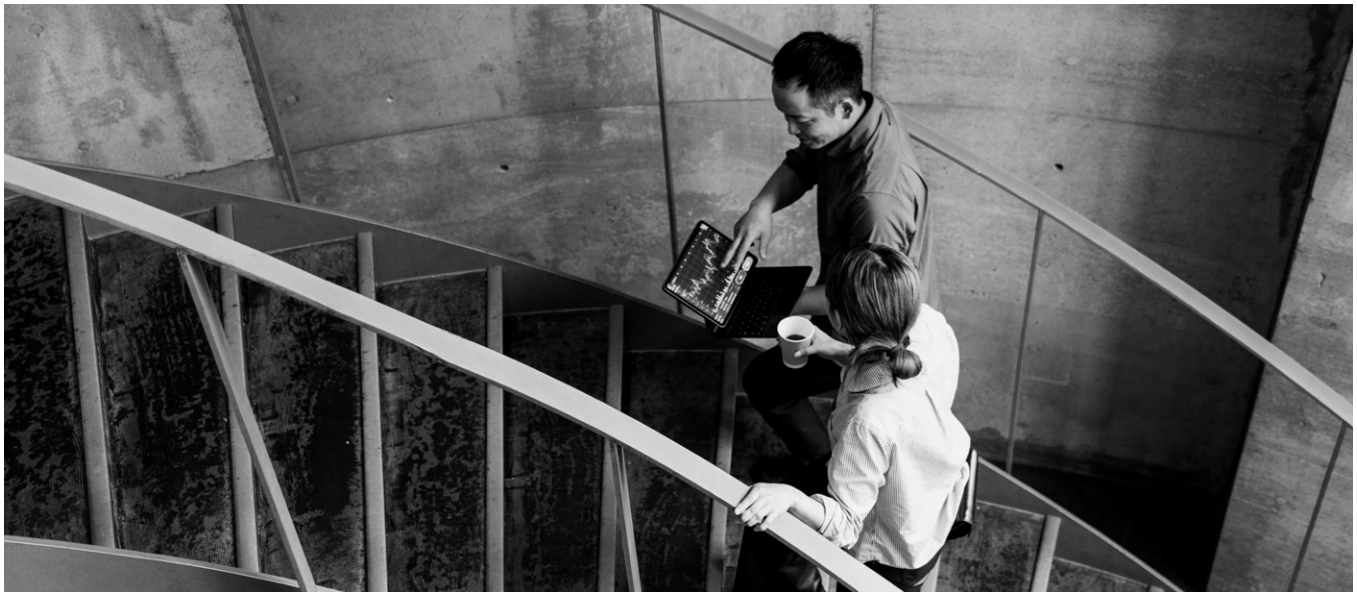
One-Step vs Two-Step Transactions

A single-step sale, where the transaction is signed and closed simultaneously, will greatly simplify negotiations and reduce costs, e.g., by removing the need to address closing and operational risks in an interim period. Whether this is possible usually depends on whether third party approvals will be strictly required, e.g., under competition (antitrust) law because of the size of the parties or the value of the transaction, under national security law if there is a foreign investor, or if there are any key customer or supplier consents as a condition to closing that the parties are uncomfortable requesting until a signed agreement is in place.

Where the sellers expect a one-step sale, this should be stated in the process letter. Even if the sellers anticipate significant pushback, an aggressive buyer may be prepared to assume and close over various risks. Sellers and their counsel can assist bidders in getting comfortable – through appropriate risk allocation, transactional insurance or otherwise – that minor or moderate matters should not impede a one-step sale. High conviction bidders may also bring creative solutions to the table. Where a two-step sale is likely, well-prepared sellers will get ahead of matters, e.g., by making preliminary assessments of key approvals based on the jurisdiction(s) of the target's business. This will in turn facilitate discussion, negotiation and progress with bidders.

Multiple tactical issues arise around the auction PSA in a two-step sale. Interim period covenants will require careful consideration as, although the sellers hold the pen, they are largely for the buyer's benefit. A key closing condition will be the sellers' bringdown of their R&Ws and the bringdown's treatment of materiality. The standard applied will inform what degree of change to the target's business or assets may require the sellers to update the buyer prior to closing.

In a two-step transaction, sellers should also focus on the bidders' financial capacity to close. Often, a bidder's "purchaser" is a newly formed acquisition vehicle with no operating history or assets. That structure can leave the sellers effectively relying on the credit of the sponsor or parent standing behind the vehicle. Accordingly, sellers should pressure-test the bidders' sources of funds and insist on appropriate deal protections, which typically include a mix of equity commitment letter, debt commitment letter, a parent guarantee and/or break fee, to ensure the purchaser's obligations are more than a paper promise.



Representations & Warranties

Several interrelated strategic considerations are raised in scoping the sellers' R&Ws in the draft PSA. The fundamental question is where to fall on the spectrum between seller-friendly and middle of the road. Among other things, close attention should be paid to the use of materiality and knowledge qualifiers. The scope of the R&Ws will also depend on whether or not the seller is requiring the bidders to obtain RWI.

An auction PSA that skews seller-friendly will typically – although not necessarily in the context of a hot asset – invite lengthy bidder mark-ups and "loss of the pen". Where there is a complex issue, it's preferable to address it with the sellers' own carefully crafted wording. A more balanced approach can reduce friction, help keep costs down, and expediate negotiation and closing. A balanced approach should also mean that the considerations behind the disclosure schedules are further developed and that the sellers are better prepared to quickly respond to confirmatory due diligence questions.

A "Clean Walk" vs Indemnities; RWI

True "clean walks" for sellers grew more common in private M&A in the early 2020s and are a common starting position in an auction process letter and draft PSA: no survival of the sellers' R&Ws, no indemnification or indemnity escrow, and the buyer's only post-closing recourse is RWI at its sole cost. However, an honest conversation among the sellers, the M&A broker and legal counsel should be had about whether this is a likely outcome in the particular auction, given probable market interest in the target. Regardless of whether most elements of a "clean walk" are obtained, bespoke indemnities may be unavoidable for certain issues, e.g., known risk.

Even though responsibility for acquiring RWI will fall on the buyer, there may be opportunity for the sellers to facilitate this process. The sellers can work with RWI brokers to prepare an indicative RWI package in advance of launching the bid, including to identify what exclusions to expect and to prepare to address these during negotiations, including via additional insurance instruments that would supplement the RWI. RWI brokers are increasingly looking to develop this service, particularly for regular PE clients and in connection with structured sales processes.



Fasken Contacts

QUEBEC



Kiran Singh
Partner
+1 514 397 4370
ksingh@fasken.com



Guillaume Synnott
Partner
+1 514 397 4325
gsynnott@fasken.com



Elissa Brock
Partner
+1 514 397 7504
ebrock@fasken.com



Adam Saskin
Partner
+1 514 397 4343
asaskin@fasken.com

ONTARIO



Grant E. McGlaughlin
Partner | Co-Leader,
Private Equity
+1 416 865 4382
gmcglaughlin@fasken.com



Gesta A. Abols
Partner | Co-Leader,
Cross Border and
International Practice
+1 416 943 8978
gabols@fasken.com



Claire Gowdy
Partner
+1 416 868 3541
cgowdy@fasken.com



Nicole Park
Partner
+1 416 943 8902
npark@fasken.com

ALBERTA



Melissa Cook
Partner
+1 403 261 8499
mcook@fasken.com



Brad Schneider
Partner
+1 403 261 5502
bschneider@fasken.com



Jason Giborski
Partner
+1 403 261 6154
jgiborski@fasken.com



Paul Blyschak
Counsel
+1 403 261 9465
pblyschak@fasken.com

BRITISH COLUMBIA



Kareen A. Zimmer
Partner
+1 604 631 4775
kzimmer@fasken.com



Adrian Wan
Partner
+1 604 631 3222
awan@fasken.com



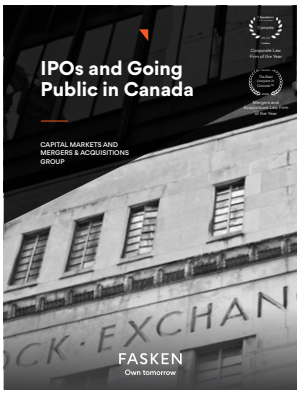
Grant Foster
Partner
+1 604 631 4916
grfoster@fasken.com

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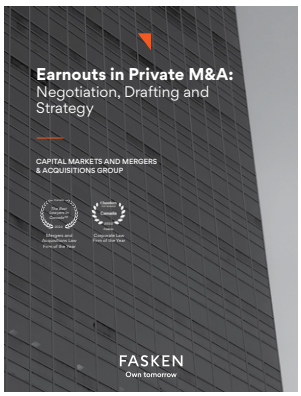


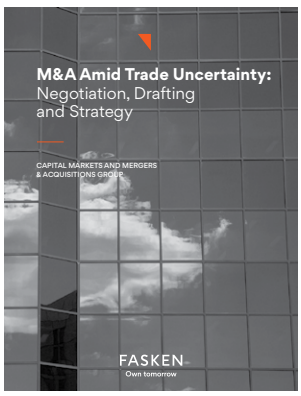


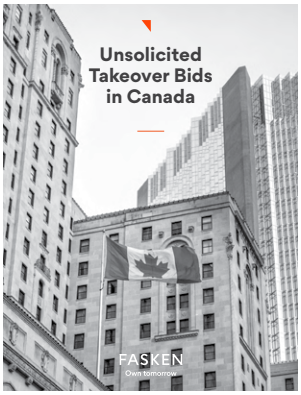












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