



EDUCATIONAL RESOURCES

Dollars and Sense: A Guide to Selling a Durable Medical Equipment Supplier

Denise Leard, Esq. & Jonathan E. Sterling, Esq.
Brown & Fortunato, P.C.

 DMEPOS



ACHCU IS A BRAND OF ACCREDITATION COMMISSION *for* HEALTH CARE



Topics

- DMEPOS Industry
- Transaction Process
- Key Considerations
- Tips for Sellers



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DMEPOS Industry

- Population is Aging
 - Estimated that the world's population over 60 will double from 12% to 22% from 2015 to 2050
 - People want to stay in their homes
 - Demand for DMEPOS will only increase
- In 2020 the DME Market was estimated to be a \$52.9 billion industry
 - Expected to see a compounded average growth rate of 5 to 6 percent through at least 2026

DMEPOS Industry

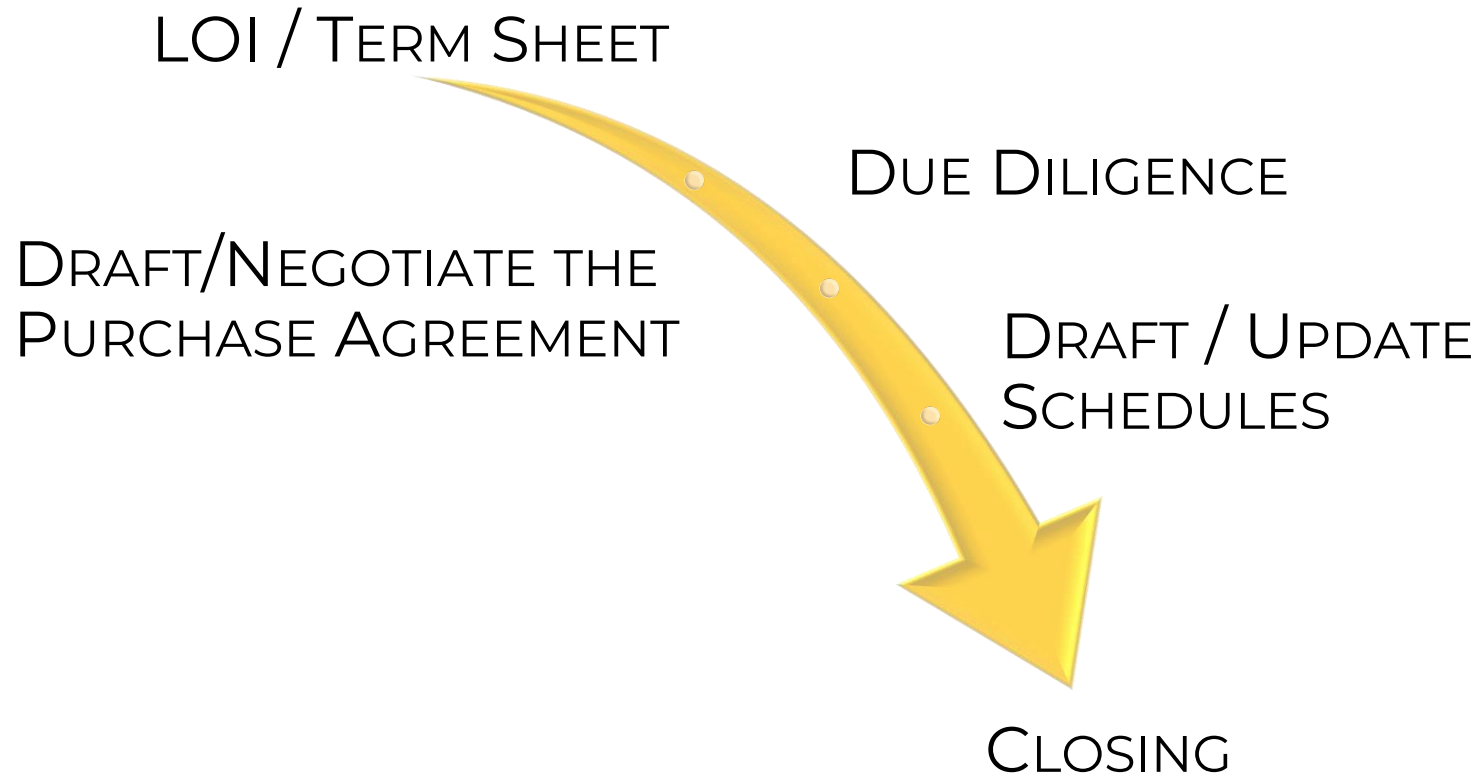
- Market changes in the last decade
 - Competitive Bidding
 - Consolidation
 - Managed Care Organizations (Medicare and Medicaid)
 - Reimbursement Cuts
 - COVID-19

Transaction Process

Letter of Intent; Diligence;
Purchase Agreement; Closing
and Transition



The Transaction Process



Letter of Intent: Seller's Perspective

- The purpose is to formalize a non-binding meeting of the minds to justify the time and expense required to pursue the deal
- Seller's perspective:
 - More specificity
 - Purchase Price
 - Payment timing and structure
 - Limitations on post-closing exposure (i.e., baskets and caps)
 - Confidentiality (if no separate CA or NDA)

LOI: Buyer's Perspective

- Buyer's perspective:
 - Specificity with room to negotiate pending diligence results
 - Possibility of escrow funds and/or holdbacks
 - At a minimum, mention representations and warranties are expected to be customary for transactions of like kind and size
 - Usually silent on indemnification expectations
 - Exclusivity

Diligence Categories

- Corporate / Organizational Structure
- Financial/Tax
- Employment
- Litigation (and other administrative investigations/proceedings)
- Material Contracts
- Intellectual Property
- Regulatory

Diligence: Scope

- Equity acquisition
 - The Buyer is stepping into Seller's shoes as the owner of company
 - Takes the good, the bad, and the ugly
 - Diligence is crucial and typically much more detailed
- Asset acquisition
 - The Buyer typically acquires the assets free and clear of all liens, security interests, and other encumbrances
 - No, or very few, liabilities are assumed
 - Diligence is still crucial, but not as detailed as compared to an equity deal
 - For example, less emphasis on employees, contracts, and taxes (depending on what Buyer is assuming)

Diligence: Scope

- Equity acquisition of Medicare DME Supplier
 - No gap in billing
 - Must update Medicare of change within 30 days of the date of the change
 - MCO agreements may transfer

- Asset acquisition of Medicare DME Supplier
 - Will need to apply for a new PTAN
 - Will be retroactive to date of acquisition or compliance with supplier standards as applicable
 - Will need to hold claims until new PTAN is issued.
 - MCO agreements will not automatically transfer

Diligence: Employment Considerations

- A Buyer wants to know who the employees are, their current roles, years of service, benefits, and other compensation
- This creates a snapshot of the company's payroll obligations and helps identify employment issues (e.g., misclassification) moving forward
- It also sets a baseline – a Buyer does not want to be surprised post-closing with employees saying “[Seller] promised me _____”
- Buyers want to see all employment agreements, non-competes, non-solicitation agreements, confidentiality agreements, independent contractor agreements, workers' comp claims, and benefit information (if any)

Diligence: Financial/Tax Considerations

- A Buyer wants to know how the company is taxed
- The easiest way to determine this is request tax returns for the last 3 years
- On the financial side, Buyers want to see balance sheets and income statements and determine whether any debts or other liabilities exist outside of such financial statements
- Therefore, Buyers typically request financial statements (audited or unaudited) for the last 3 years and a schedule of all outstanding debt

Diligence: Corporate Considerations

- These requests are much more important in an equity transaction
- Buyers want to see:
 - all formation and governing documents (e.g., bylaws, shareholder agreements, company/operating agreements, etc.)
 - stock books and equity ledgers
 - organizational charts (showing all direct and indirect owners and all officers, directors, and managers)
 - whether any options or convertible securities exist
 - a list of jurisdictions in which the company owns property and/or operates
 - any previous transactions the company was a party to outside the ordinary course of business

Diligence: Contract Considerations

- In an asset deal, no contracts may be assumed by the Buyer
- However, even if a Buyer is obtaining its own contracts, it may be helpful to review the Seller's contracts to understand the current customers, vendors, and terms with each
- In an equity deal, Buyers want to see all contracts but especially those that are valuable to the enterprise
- In doing so, the review places an emphasis on identifying pre- and post-closing notice and consent requirements
 - These third-party issues are capable of delaying, or even killing, transactions

Diligence: Litigation Considerations

- From a strictly legal perspective, Buyers do not want to buy assets or a company that is, or could be, the subject of litigation, audits, investigations, or other administrative proceedings
- Therefore, it is critical for Buyers to confirm:
 - That all prior claims and litigation have been completely settled and there are no continuing obligations
 - There are no pending lawsuits, audits, investigations, or other administrative proceedings
 - There are no threatened claims, audits, investigations, or other administrative proceedings

Regulatory Diligence: Permits & Enrollments

- Common Licenses and Enrollments in Governmental Programs
 - License to provide services
 - Accreditation
 - Medicare Provider Agreement
 - Enrollment in Medicaid and Medicaid Waiver Programs
 - Managed Care Organizations

Regulatory Diligence: Permits & Enrollments

- Identify all payors, licenses, and enrollments in governmental programs
- Review information reported to payors, licensing agencies, and governmental programs
- Request information to assess compliance with standards and participation requirements
- Identify notices required to maintain licenses, contracts, and enrollments

Regulatory Diligence: Audits & Records

- Common Requests

- Information relating to third-party payor audits
- Sample of patient records and related claims
- Information relating to billing practices

Regulatory Diligence: Mock Surveys

- Can help identify compliance issues before a sale or during diligence
- Independent third party examines the facility in “real world” conditions
- Provide an outsider’s perspective of the practices of the facility

Regulatory Diligence: HIPAA & Compliance

- Examples of requests
 - Copies of (a) resolution and/or minutes of the Board of Directors of the Company or other similar management body, related to the adoption of the Company's corporate compliance program, (b) minutes and/or other records of compliance committee meetings, (c) corporate ethics and compliance code of conduct; (d) policy and procedure manuals, including policies and procedures related to coding, billing, and contracting, (e) all compliance training materials, including a log of training conducted over the last two years, (f) any compliance risk assessments performed and internal review or compliance audit reports; (g) the log of all matters reported to corporate compliance department and/or chief compliance officer; and (h) any related agreements to such compliance efforts over the past three years (including a log of all calls to the Company's compliance hotline)
 - Provide copies of all records relating to internal and external grievances and complaints filed with the companies within the past 24 months

Regulatory Diligence: HIPAA & Compliance

- Examples of requests
 - Listing of compliance officer, compliance committee members and all other compliance personnel, including name, position and compensation (e.g., salary, bonus). Attach a copy of a job description for each position.
 - Listing of HIPAA Privacy Officer and HIPAA Security Officer and copies of related job descriptions
 - Copies of HIPAA Privacy and Security policies and procedures
 - Copy of template Business Associate Agreement and Notice of Privacy Practices
 - Copies of last two security risk assessments and risk management plans prepared by the target HHA's in accordance with the HIPAA Security Rule

Regulatory Diligence: Referral Arrangements

- United States ex rel. Medrano and Lopez v. Diabetic Care Rx LLC, d/b/a Patient Care America, et al., No. 15-CV-62617 (S.D. Fla.)
- Key Federal Laws
 - False Claims Act
 - Anti-Kickback Statute
 - Stark Law
- Exceptions and Safe Harbors



Regulatory Diligence: Referral Arrangements

- Common arrangements that should be reviewed
 - Medical Director Agreements
 - Relationships with family members of physicians
 - Leases with referral sources
 - Preferred Provider Agreements
 - Service arrangements with referral sources
 - Historical ownership
 - Marketing practices



Diligence: How Buyers Manage Risk

- Restructure Transaction
- Address all risks pre-closing
- Allocate risks in the purchase agreement and ancillary documents
 - Typically achieved by adjusting scope and survival of disclosures required by the Schedules, representations and warranties, and indemnification obligations

Anatomy of a Purchase Agreement

- Transaction Structure/Purchase Price
- Representations and Warranties
- Covenants
- Indemnification
- Miscellaneous Provisions
- Exhibits (Ancillary Documents)
- Disclosure Schedules



Reps and Warranties

- Representations are statements or presentations of facts made to induce the other party to act
- Warranties are stipulations that certain facts, in relation to the subject of the contract, either are true or will continue to be as stated or promised in the purchase agreement
- These are the first steps in allocating risk in a transaction
- Sellers want these to be as narrow as possible

Reps and Warranties Involving Health Care Issues

- Licenses, permits and accreditation
- Consents and governmental approvals
- Compliance with laws
- Billing practices
- Contracts and commitments
- Litigation and compliance



Indemnification

- Risk is inherent in each transaction
- Buyers always have more exposure due to the information imbalance
- No matter how thorough diligence is, certain issues do not manifest themselves until after the transaction has closed
- Indemnification is the mechanism for allocating the risk – it provides for compensation in the event of specific harms or losses
- Buyers want the scope of indemnification to be as broad as possible, but Sellers want this to be as narrow as possible

Closing

- Regulatory documents and issues aside, closings can typically be done electronically by exchanging each party's signatures
- If this is done, make sure the documents allow execution by counterparts and electronic signatures
- The transaction is “closed” when all signatures have been exchanged and “funded” when Seller receives the cash payable

Transition Services Agreements

- Allows the parties to coordinate a smooth and successful transition in an effort to minimize interruptions to patients
- Typically, the Seller agrees to assist the Buyer with specific services for a limited time post-closing
- Sellers are typically compensated, but the payment terms must be reviewed by a health care attorney to avoid kickback issues



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Tips for Preparing for a Sale

Valuation and Fit; Brokers; Corporate Documents; Financial Statements; Regulatory Documents and File



Preparing for a Sale: Valuation and Fit

- Many valuations are based on a multiple of Earnings Before Interest, Taxes, Depreciation, and Amortization (o/k/a EBIDTA)
- Sellers can consult with Brokers, Investment Bankers, and Accountants to get an understanding of what their business may be worth
- Sellers are now doing diligence on Buyers – depending on how the deal is structured, Sellers may look for things other than a high purchase price (e.g., how much cash is tied up in escrow, no earnouts, post-closing benefits, title/role/responsibilities, who will take care of their employees, etc.)

Preparing for a Sale: Brokers

- Brokers can:
 - Connect parties willing to buy and sell
 - Navigate the LOI/Term Sheet negotiation process
 - Assist with collecting diligence items and responding to diligence requests
 - Help resolve core issues that can delay, or terminate, transactions



Preparing for a Sale: Corporate Documents

- Make sure the entity has up-to-date meeting minutes naming officers, directors, and/or managers with current terms
- Update stock books and equity ledgers
- Collect and account for all original equity certificates
- Determine whether transaction requires any amendments to formation or governing documents
- Collect signed and complete copies of all material contracts

Preparing for a Sale: Financial Statements

- Determine whether the company's financial statements are prepared in accordance with GAAP
- Audited financial statements are preferred, but unaudited versions should also be acceptable
- Make sure the financials provided are aligned with tax filings
- Enlist the help of a CPA

Preparing for a Sale: Regulatory Documents

- Update information on file with regulatory agencies
 - PECOS
 - NPPES
 - Information on file with state licensing agencies and Medicaid
- Prepare file of commonly requested diligence items
 - Licenses
 - Revalidation and/or Medicare Approved Enrollment Record (PECOS)
 - Compliance and HIPAA policies and procedures
 - Payor contracts
 - Spreadsheet tracking audits
 - Medical Director Agreements, invoices, and payment records



Questions?

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Thank you

Denise M. Leard, Esq.
dleard@bf-law.com | 806-345-6318

Jonathan E. Sterling, Esq.
jsterling@bf-law.com | 806-345-6303



Amarillo · Dallas

