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# Part V: Purchasing an Aircraft: The Contracting Process

GKG Law, P.C. Webinar Series

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# Preparation of the Offer Letter

→ Coordination with the definitive purchase agreement:

- Avoids ambiguous terms
- Avoids omitting items that are difficult to negotiate later



# Preparation of the Offer Letter

- Define the aircraft, including loose equipment
  - May refer to an attached specification sheet
  
- Define the aircraft documents
  - All documents required, or only what is in seller's possession?





# Preparation of the Offer Letter

- State the amount of the deposit
  - deposit may constitute liquidated damages for buyer's default
  - particularly relevant with aircraft values soft, and large inventory of used aircraft for sale
  
- Specify point in time when deposit becomes non-refundable



# Preparation of the Offer Letter

- State whether the buyer can reject the aircraft at the completion of the inspection for ANY REASON or only for some “material discrepancy”
- Define “Material Discrepancy”
- If the buyer is permitted to reject the aircraft after the inspection, specify what costs and expenses, if any, the buyer must reimburse to the seller, or the seller must reimburse to the buyer (e.g., flight costs to and from inspection facility, inspection costs)





# Preparation of the Offer Letter

- Describe required condition of the aircraft at time of closing
- List any maintenance or other programs and require that the seller be current on program financial obligations



# Preparation of the Offer Letter

- Specify where the pre-purchase inspection will be performed
- Describe any limits on the scope of inspection
- Specify that buyer pays inspection costs and expenses and that seller pays for all corrective work



# Preparation of the Offer Letter

- Specify whether the seller can elect not to fix discrepancies, and if so, whether the seller must reimburse the buyer inspection costs
  
- Specify who pays the aircraft movement costs, and at what agreed upon rate, for:
  - Movement to inspection facility
  - Movement to delivery location





# Preparation of the Offer Letter

- State which party prepares the purchase agreement
- Specify deadline for execution of the purchase agreement
- State whether inspection may or may not commence prior to execution of purchase agreement



# Preparation of the Offer Letter

- May include a confidentiality provision
- May require seller to remove the aircraft from the market, pending execution of the purchase agreement



# Preparation of the Purchase Agreement

## → Overview:

- Include terms consistent with the offer letter, and add more detail
- Include detailed closing procedures
- Add common “boilerplate” provisions
  - (e.g., international registry, governing law and venue, right to assign for financing or 1031 purposes, counterparts)





# Preparation of the Purchase Agreement: Common Issues

- Define “Airworthiness Discrepancy”
- Who determines which deficiencies are “airworthiness discrepancies” that must be corrected?
- Do all inspection facilities and manufacturers use the same terminology?



# Preparation of the Purchase Agreement: Common Issues

- Once buyer's deposit becomes "non-refundable" are there any other exceptions that permit the return of the deposit?
  - (e.g., aircraft is damaged or destroyed prior to closing, seller's default)
  
- If the agreement is terminated, is confirmation that buyer has paid for inspection and aircraft movement costs required before deposit is returned?





# Preparation of the Purchase Agreement: Common Issues

- Will the deposit be seller's sole remedy for non-performance by buyer?
  - Will the escrow company release the deposit to the seller?
- Will reimbursement of inspection costs be buyer's sole remedy for non-performance by seller?





# Preparation of the Purchase Agreement: Common Issues

## Survival of representations and warranties

- Clear title
- No conflicting agreements or restrictions on ability to sell
- Damage history
- Accuracy and completeness of books and records
- Payment of taxes



# Preparation of the Purchase Agreement: Common Issues

- What is buyer's recourse in a breach of warranty action if seller is a special purpose entity?
- Will seller's corporate parent (or shareholder) guarantee seller's representations and warranties?
- Title insurance





# Preparation of the Purchase Agreement: Common Issues

- Must seller confirm receipt of funds before authorizing the escrow agent to release the bill of sale?
- Will buyer's lender fund without concurrent filing of bill of sale?
- Will International Registry filing be required; timing considerations?





# Purchasing From a Broker

→ Risks in “Back-To-Back” deals with brokers

- Whose deposit is in escrow? Seller has contracted with the broker, but the broker has not placed the deposit in escrow
- Are both purchase agreements identical?
- Are the seller and ultimate buyer in direct communication?



# Purchasing an Existing OEM Agreement

→ Many cumbersome issues

- Is the OEM agreement assignable?
- Will the manufacturer provide its consent?
- Will the manufacturer verify the total deposit, the critical milestone dates and that the contract is in good standing? If not, how is the buyer protected?





# Purchasing an Existing OEM Agreement

- Is the seller still liable if the buyer subsequently defaults?
- If buyer has customized the interior, and seller completes the purchase due to a buyer default, is the aircraft value impacted by the buyer's interior selections?
- How is the seller protected?





# Purchasing an Existing OEM Agreement

- How is the buyer protected from a claim by the manufacturer of breach of contract?
- Is the seller an entity with substantial assets?
- Does the entity being purchased have historic operations and liabilities?
- Will the buyer's money be placed in escrow or go directly to the seller?



# Closing Remarks



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