



## Example letter of intent (seller's mark-up)

This document is an example of a letter of intent relating to an offer to buy a high growth tech business. The letter has been proposed by the purchaser and subsequently marked-up with the seller's amendments and comments.

We have provided this example letter so as to give an indication of some of the matters a seller would typically push back on at this stage of the negotiations.

When starting down the path of selling a business, the buyer and seller need to figure out if they can *do a deal*. Apart from the initial conversations, and sometimes a high-level indication of possible terms, the letter of intent (sometimes also known as a *term sheet*, or a *non-binding indicative offer*) is the first opportunity for the buyer and seller to set out and agree the material commercial terms of the deal, at least at a high level.

It is important that any letter of intent clearly sets out the key terms of the deal, including the price, a description of how and when that price will be paid, the assets being

purchased and the liabilities being assumed. While letters of intent are stated to be non-binding, in practice it is very difficult to vary any terms agreed at this stage. It is important that you seek advice from legal and financial advisers when considering a letter of intent as this is where a lot of the value in a deal is won or lost.

This letter assumes a transaction structured as an acquisition of the business and assets of a selling company, rather than shares in the target company. As is usual with letters of intent, it is non-binding, except for the confidentiality and exclusivity provisions.

This letter is not a template. It does not address all of the issues that might apply to a letter of intent. You should not attempt to sell (or buy) a business without legal advice.

This letter is based on an imaginary transaction. The parties are fabricated, as are all details included in the letter, including the description of the business being sold.

## BLACK LIMITED

2 May 2016

Directors  
White Software Limited

By email

### acquisition of the business and assets of White Software Limited

Black Limited (**Purchaser**) is pleased to provide you with this non-binding offer to purchase the business and assets (**Business**) of White Software Limited (**Seller**).

We set out the terms of our offer below. These terms are not exhaustive and are not legally binding except for the terms stated in paragraphs 10, 11 and 12 of this letter. There will be no obligation to sell or purchase the Business until a binding sale and purchase agreement is signed by the parties.

### terms of the offer

- 1 **assets to be purchased:** Our offer is for all of the business and assets of the Seller (**Assets**), including the *White Software* and all other intellectual property, know-how, customer contracts, supplier contracts, customer relationships, goodwill, plant and equipment, lease commitments and books and records but excluding receivables and cash.
- 2 **assumed liabilities:** We will assume liability from completion for the contracts assigned to us. We will assume no other liabilities relating to the Business.
- 3 **purchase price:** The purchase price for the Assets is up to \$15,500,000. \$10,500,000 will be paid on or about completion of the sale and up to \$5,000,000 will be paid over two years (**earn-out period**) if the Business meets expected revenue targets.

The revenue targets are \$3,000,000 in the first year after completion and \$3,500,000 in the second year after completion. If these targets are met, a payment of \$2,500,000 will be made in each of the first and second years.

The sale and purchase agreement will contain obligations and restrictions in respect of the operation of the Business after completion, to help ensure that the Business is sufficiently resourced and appropriately organised so as to be able to achieve the revenue targets.

**Commented [A1]:** We understood that we would be selling the Business for a maximum purchase price of \$15.5m.

**Commented [A2]:** We can only agree to sell the Business with an earn-out if a greater proportion of the purchase price is paid up-front.

**Commented [A3]:** If there is to be an earn-out, three years is too long for us as Sellers. Two years is sufficient time for the business to have proved its value.

**Commented [A4]:** As the current owners of the Business, we think these revenue targets are unrealistic and do not reflect the projections that we have provided for the Business. The adjusted figures we have shown are in line with our projections.

**Commented [A5]:** In order to achieve the expected revenue targets, the Business will need to be operated in essentially the same way as it is operated now. The Purchaser will need to accept restrictions on its ability to change the way the Business operates, and will need to commit to providing support to the Business.

4 **assumptions:** Our offer is made on the assumption that revenue to the year ended 31 March 2016 is at least \$2,800,000.

5 **purchase price adjustment:** A net tangible asset calculation will be carried out as at the completion date. We will withhold part of the purchase price payable at completion and the purchase price will be adjusted upwards or downwards to the extent the net tangible assets at completion are greater or less than an amount to be agreed once we have completed our financial due diligence. The amount of the purchase price to be withheld will be a reasonable estimate of any likely downward adjustment of the purchase price.

6 **conditions:** Our acquisition of the Business is conditional on:

a us conducting, and being satisfied with the results of, our financial, legal, taxation, technical and commercial investigations into the Business. The Seller will provide reasonable assistance to enable us and our advisers to complete our due diligence review, including providing access to financial and legal documents;

b a sale and purchase agreement incorporating usual warranties for a transaction of this nature from the Seller; and

c receipt of all necessary approvals and consents from our board and shareholders.

7 **Employees:** We will offer employment, on no less favourable terms and conditions, to all employees working in the Business at completion.

8 **Restraint covenants:** The Seller and its shareholders will agree not to compete directly with the Business during the earn-out period and for 1 year after the end of the earn-out period.

9 **Documents and timing:** We will prepare the first draft sale and purchase agreement and will provide a first draft to the Seller within two weeks of both parties signing this letter. We expect the sale of the Business to complete by 31 July 2016.

10 **Confidentiality:** The contents of this letter, and the fact that it has been signed, are subject to the terms of the confidentiality agreement between us dated 12 March 2016 and, unless otherwise provided under that agreement, may only be disclosed by the Seller or by us to our respective shareholders, directors and advisers on a *need to know* basis.

11 **Exclusivity:** From the date of this letter to 31 July 2016, the Seller must not, and must ensure that none of its shareholders, directors, employees, contractors, agents or representatives will, directly or indirectly:

a sell or agree to sell to any person any part of the Business and Assets or any part of the business and assets of any subsidiary of the Seller (except in the ordinary course of business) or any shares in the Seller or in any subsidiary of the Seller;

b solicit any person to make any proposal or offer for any part of the Business and Assets or any part of the business and assets of any subsidiary of the Seller (except in the

**Commented [A6]:** Based on our understanding as the current owners of the Business, we do not expect there to be a significant adjustment based on this calculation. The amount to be withheld should be a small amount, limited to a reasonable estimate of any downward adjustment.

**Commented [A7]:** If the value of the assets is greater than that expected, we should be paid the difference.

**Commented [A8]:** This transaction is confidential so we cannot allow open access to all employees and to our premises. We can arrange for you to speak with senior managers and, if requested, we can arrange an after hours visit to our premises.

**Commented [A9]:** We, in our capacity as shareholders of the Seller, will not be personally liable for claims under the warranties.

**Commented [A10]:** This is a 5 year non compete. We (the Seller, and its shareholders) accept that we will not compete with the Business during the earn-out period (it would make no commercial sense to do so) and for a reasonable period after the end of the earn-out period. But 3 years is too long. Also, the definition of the activities that the Seller and its shareholders are restrained from participating in needs to be carefully defined.

**Commented [A11]:** There is no need for exclusivity to run until the end of October; the parties expect this transaction to be completed by 31 July.

ordinary course of business) or the sale of any shares in the Seller or in any subsidiary of the Seller; or

- c engage in any discussions or negotiations with any person in connection with any possible proposal or offer relating to any part of the Business and Assets or any part of the business and assets of any subsidiary of the Seller (except in the ordinary course of business) or the sale of any shares in the Seller or in any subsidiary of the Seller.

12 **Break-fee:** If the Seller breaches paragraph 11, and the parties do not complete the proposed transaction, the Seller must pay to us \$150,000 as full compensation for the costs we anticipate incurring on this transaction to the end of the exclusivity period. On payment of that fee, we will have no further claim against the Seller for breach of clause 11.

#### next steps

Please sign this letter below and return the signed version to me to indicate the Seller's acceptance of this offer.

We look forward to working with you to complete this transaction.

Yours sincerely

John Black  
**Black Limited**

**Commented [A12]:** If we receive a better offer for the Business during the exclusivity period, we would prefer to have the option to pursue that other offer and to make this payment to the Purchaser.

**Acceptance**

White Software Limited accepts the terms set out in this Letter of Offer.

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Signature

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Name

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Title

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Date