



Conditions Precedent

A condition precedent is a condition (i.e., a promise) or event that must occur before the parties are obligated to perform. In a purchase agreement, a condition precedent is a promise or event that a party is obligated to perform before closing occurs.

For example, a common condition precedent in a purchase agreement is that the seller is not required to transfer the assets unless the buyer pays the purchase price, and the buyer is not obligated to pay the purchase price unless the seller transfers the assets.

Failure by one party to satisfy a condition precedent allows the other party to terminate the contract. In purchase agreements, the failure by one party to satisfy a condition precedent does not result in a termination of the purchase agreement. Typically, the party that has the right to terminate the purchase agreement uses the condition precedent to leverage a more favorable purchase price or more favorable terms (e.g., changing the representations and warranties).

The conditions precedent section of a purchase agreement usually has the following language: *“The purchaser’s obligation to purchase the company shall be subject to the prior satisfaction of the following conditions precedent:”*

This will be followed by a list of all the conditions precedent required to close. The obligation of the purchaser to purchase the company is subject to the prior satisfaction of each of the specified conditions. The seller’s failure to satisfy any of the conditions will give the purchaser the legal right to terminate the purchase agreement. Likewise, the obligation of the seller to sell the company is subject to the prior satisfaction of each of the specified conditions. The purchaser’s failure to satisfy any of the conditions will give the seller the legal right to terminate the purchase agreement. Purchase agreements usually require both parties to satisfy a set of conditions, so that either party is excused from performance in the event the other party fails to satisfy the conditions precedent.

Purchase agreements generally have similar conditions precedent. A party with a high degree of bargaining power may negotiate the satisfaction of several conditions before it will close. Common conditions precedent include:

- No breach. Performance is not required if the other party has breached its covenants or representations and warranties in the contract.
- Certified organizational documents. Entities will often be required to deliver copies of their certificates of incorporation, operating agreements, or other organizational documents.
- Corporate action. Entities will often be required to provide evidence of shareholder or board action authorizing the execution, delivery, and performance of the purchase agreement.
- Third party consents. Both parties usually want all material consents from third parties before closing.

Purchase agreements usually require the satisfaction of all conditions precedent prior to or at closing.