

Construction

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Bigger is better — sometimes

There's a lot to be said for the entrepreneurial spirit that is inherent in owning and running a business. It takes a lot more than spirit, however, to grow a construction company and effectively compete in today's tough economy.

That's why some contractors are willing to lose some of their independence so they might reap the benefits of consolidation. But don't make this leap without carefully considering both the upside and the downside.

The upside

A consolidator, which may be an investor, individual company or a group of companies, buys numerous small businesses to create one big company with centralized operations. The goal is to successfully integrate the operations and cultures of multiple firms and merge them into a single, smoothly operating entity that has long-term profitability.

Consolidated contractors are able to gain economies of scale they may not have achieved as independent businesses. Other benefits they may enjoy include higher levels of productivity, more access to capital at a lower cost, greater ability to provide new services, lower overhead, newer technology and more efficient operations.

Being part of a larger organization means your company can continue with minimal financial investment on your part. It also opens more opportunities for your employees in the form of new jobs they may be able to perform



(such as those that are management-related) and training and benefits that would otherwise not be available.

The downside

Joining a consolidator has its trade-offs, however. In exchange for financial compensation, you give up the freedom to run your business.

A consolidator wants your customers, your management and your employees — including you. Instead of being the boss, you'll be an employee. Instead of making the rules, you'll follow someone else's. And instead of turning over the reins to your hand-picked successor, you will hand over day-to-day operations to the consolidator.

You must also consider what hooking up with a consolidated contractor will do to your company culture. Independent business owners tend to act on gut instinct, while consolidators are generally in it for the money, making decisions based mostly on economics. If an employee is having personal difficulties, for example, you probably would bend over backward to help that individual. That may not be the case with a consolidated company. If you want to bid on a project, such as a city park restoration, because it's personally meaningful, you can do it. But a consolidator may not be interested in less profitable endeavors.

Ensuring a good fit

If you and the consolidator aren't compatible, you'll be miserable when the deal closes.

So, take some time to:

- Determine if the consolidator has recently negotiated a successful transaction in the construction industry;
- Ask for references — then ask the references how the firm handled their transactions; and
- Talk with contractors who have sold their businesses to consolidators to learn how they fared and whether they would do it again.

Consolidated companies are also under constant pressure to generate positive quarterly earnings. As an independent entrepreneur, however, you can take a long-term view and ride out some early losses if you see a future payoff.

The right match

If you think pooling resources is a good move for your company, take time to thoroughly research the consolidator you're considering joining and make sure your work philosophies line up.

Finding the right price and a good fit may take awhile. Don't rush the process, and don't be afraid to ask the hard questions. You need to make sure you'll be comfortable with the consolidator, because the consolidator will become your employer.

The bottom line

Many construction businesses are independently owned and operated, and in some cases have been run by the same family for generations. They are successful, well managed and respected but may not have the resources needed to grow and reach higher levels of productivity.

If your company is at that place, the thought of hooking up with a consolidator and trading autonomy for growth and financial security may be quite appealing. On the other hand, if you enjoy having the final say on decisions and controlling the future of your company, you'll probably be happier remaining independent. *T*

Riskier business: Hiring undocumented workers gets more dangerous

Contractors may be tempted to curb labor shortages and minimize labor costs by hiring undocumented workers, but they may step on a landmine if they do. The federal government is under increasing pressure to crack down on offenders and is responding accordingly.

Construction is the largest employer of short-term illegal workers in the United States, according to the Pew Hispanic Center in Washington, D.C. The center alleges that 1.4 million unauthorized workers are employed in some form of construction, accounting for 12% of the industry's work force.

Truth or consequences

Penalties for companies that knowingly hire illegal workers range from \$100 for a paperwork violation to \$10,000 for a violation of a cease and desist order. Employers can even go to prison.

Contractors could face an even harsher reality under enforcement-heavy proposed federal legislation. For example, employers would face fines as high as \$20,000 for hiring undocumented workers under a Senate measure. The House passed a bill in December that would impose fines of up to \$40,000. At press time, lawmakers were still trying to hammer out a compromise bill.

The clampdown

The federal government is also stepping up its enforcement of existing laws. U.S. Immigration and Customs Enforcement (ICE), which succeeded the Immigration and Naturalization Service, is more aggressively pursuing violators. It won 127 criminal convictions last year on a national basis, and obtained an \$11 million settlement from Wal-Mart after the government investigated its use of illegal immigrants for cleaning crews at its stores. The ICE has also kept a close eye on building-supply stores, where contractors have been known to pick up illegal aliens and take them to job sites.

The ICE is also conducting widespread audits of employment eligibility records and supporting documents. And it's initiating civil and criminal investigations of companies' immigration-related employment practices.

Meanwhile, the Homeland Security Department is seeking access to Social Security Administration





records of workers whose numbers and names don't match — access that has long been denied due to privacy concerns.

Hiring requirements

Under the Immigration Reform and Control Act of 1986, you must verify every employee is eligible to work in the United States by completing Form I-9, "Employment Eligibility Verification." To fill out the I-9, request that the employee present either of the following:

A passport. If an employee presents a passport, expired or not, you simply note the number. This document by itself is sufficient.

A driver's license and a Social Security card. If the employee doesn't have a passport, ask for a driver's license and a Social Security card together as evidence that the employee is qualified to work in the United States. Other acceptable documents to verify legal

work status include a certificate of U.S. citizenship and a certificate of naturalization.

Keep in mind that it's generally unlawful to have a "green card only" policy, as that violates anti-discrimination laws.

More requirements

If a new employee can't produce the required documents within three days of hire, he or she must present a receipt for the application of replacement documents within three business days and the required document within 90 days of hire.

You must keep the I-9 form on file for three years from the date of hire or one year after termination. It's also a good idea to keep copies of the documents employees present with their forms. It isn't up to you to determine whether the documents are fake — you need only check to see if the documents seem legitimate.

The government advises employers to conduct regular internal audits of their I-9 forms and supporting documents and make sure they're in order. Remember, the ICE periodically checks records and could come calling at any time.

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Don't take chances

Finding workers for open construction positions may be difficult, but hiring undocumented workers isn't the answer. At a minimum, you could attract investigators' scrutiny, which no one wants. In the worst case, you could face hefty fines and possibly a prison sentence. Following the law and having an attorney review your hiring policies are the smartest choices. ↑

Construction clauses 101

What you don't understand can come back to haunt you

If you're one of those contractors who doesn't scour every word — including clauses — of contracts with owners, you're treading on dangerous ground. You may end up agreeing to conditions that aren't enforceable or that would be a tremendous burden for anyone to meet.

Reading between the lines

There are a couple of ways to keep clauses from wrecking your projects *and* your business. The first is to make sure you understand all the contract requirements and know whether they're legally enforceable. Ask the owner to delete any clauses that are objectionable, or try to negotiate a compromise, perhaps with softer language. Sometimes it's possible to modify clauses to reduce their potential impact.

Keep in mind that laws vary from state to state, and that even a clause that seems fairly innocuous can have far-reaching effects. The best protection is to consult a lawyer experienced in construction law.

Some of the clauses that should give you pause include:

Restricted pricing on changes. Many owners, dissatisfied with the cost of changes, have begun to insert clauses that define how changes will be compensated. These clauses establish labor and equipment rates and define the type of markups that will be allowed. If an owner includes this type of clause, make sure the terms and conditions aren't so restrictive that you end up taking a financial hit.

Notice clauses. Contracts usually have extensive and detailed written-notice provisions. A typical provision will require that you give written notice within a specified time after a change or delay. If these provisions are in a contract, make your supervisory personnel aware of these deadlines and ensure that proper notice is provided and documented.

Dispute resolution clauses. Most contracts contain provisions for resolving disputes outside of the judicial process during the course of a project and after a project is complete. Such provisions limit the amounts being claimed and the type of evidence that can be presented and dictate who will decide disputes. Review the terms of any contract with your attorney before signing on the dotted line.

Liquidated damages clauses. Owners use this clause to set a rate to be backcharged against a contractor for each day a project comes in late. If you're negotiating a contract with this clause, be sure it states that liquidated damages will stop when the project reaches *substantial* completion, not *final* completion, and that liquidated damages will be assessed only in cases where the contractor actually caused the delay. Even if this clause isn't included, the owner still may collect for actual damages caused by project delay. So, you may want to add a contingency amount to the contract to protect yourself in case of actual delay damages.

Protect yourself

You can also be proactive and include clauses that protect your interests. Such clauses can include:

Escalation. This type of clause protects you from rising construction costs by making project owners bear the brunt of spiraling material expenses. You set the limits of expenses for materials, and, if the costs exceed those limits, owners must pick up the tab for the remaining amount or consider resign options.

Indemnity. An indemnity clause can limit your liability to the scope of your own work, rather than



requiring you to accept responsibility for others' work on a project, such as subcontractors'.

Force majeure. These clauses protect you from penalties for delays or cost overruns due to events outside your control. The clauses may limit the circumstances, such as if suppliers don't meet their obligations, or be a catch-all for any unexpected occurrence.

Call the experts

Contracts are a fact of life. Unfortunately, so is litigation. To avoid potential hassles and to protect yourself, learn the basics of contract provisions and consult an attorney who has expertise in construction litigation if you need help. The attorney can go over your contracts with an eye toward preventing future problems. *T*

Why a document retention policy can benefit you

With the abundant use of wireless technology, some would say we're on the road to becoming a paperless society. But, if you take a look around your office, you'll quickly realize that you'll never be truly paperless. Plus, the amount of electronic documents is growing daily.

While you may want to pitch everything in an effort to simplify your life, there may be a legal or tax reason for holding on to a document. What do you need to keep and what can be pitched?

Know what to save

To implement a document retention policy, you must first appoint an employee to establish your policy's goals and how you'll achieve them. He or she should look at each type of document your company uses and ask why it should be kept and what the consequences might be if it weren't.

With the profusion of contract claims, a document's lifespan should be based on the nature of the claim it might defend. For example, keep daily time reports and meeting minutes for a relatively short period of time, because project-delay claims typically arise during the course of a job and not afterward.

Defect claims typically have a longer exposure, however, requiring documents such as insurance policies and warranties to be kept for a longer period. Here are recommendations for other types of contractor documents:

- Keep as-built drawings/specifications for 10 years after completing the project.
- Save contracts for 15 years following completion.
- Retain employee records throughout an employee's tenure, plus the statute of limitation period after termination, which varies by state.
- Store tax returns permanently and the supporting documentation for seven years. Payroll tax returns need to be kept for only four years.

You'll also want to consider the costs of implementing a document retention policy. Costs vary depending on the size of your construction company and the number of jobs performed annually. But, absent an enforced policy, you'll more likely lose documents and, in turn, suffer substantial expense searching for and re-creating them. Consider electronic document retention to help cut down your costs.

Make it a living document

Treat your document retention policy as a vital part of your office operations. That means educating workers on how to abide by its rules, conducting compliance audits to ensure it's being followed and revising the document when needed.



Contractor's toolbox

Reeling from rising insurance premiums?

Take control with captive insurance

Budget-busting insurance premium hikes are making it more difficult for construction companies to afford traditional insurance. As a result, some are turning to captive insurance to control and stabilize their costs and better manage risk.

What is captive insurance? It's an insurance company that your business or another firm not in the insurance business establishes and owns as a subsidiary. Why would you want to own an insurance company? Simple: When you pay premiums, you're paying yourself rather than somebody else.

How does a captive work?

The operations of a captive are similar to those of a national insurance company. A captive can insure just about any type of risk for the parent company, including workers' compensation, general liability and automotive coverage. A captive issues direct policies to the insured company, collects premiums and pays any claims.

A construction company can form its own captive or work with other construction companies to form a group captive that covers the risk of multiple organizations. Another variation is the "rent-a-captive," an insurance company owned by a third-party sponsor such as an insurance broker. The sponsor insures the risk of many companies.

Why is it so captivating?

Typically, financing risk in a captive lowers overall costs and helps a construction company stabilize costs over the long haul, because it's less susceptible to the ups and downs of the insurance industry.

Captives also can enable your business to obtain insurance coverage — at a lower cost — that might otherwise be unavailable or unaffordable. Premiums are based on the loss experience of the captive — not on the income and expense needs of an insurance

company. Another benefit of forming a captive is being able to control claims-handling policies and procedures.

Captives have tax advantages, too. Insurance companies are eligible for special tax treatment, such as deductibility of premiums and deferred taxation of insurance income. Consult your tax advisor for details.

Finally, with a captive you can take advantage of investment income. Because premiums are received in advance and losses are paid out over time, an insurance company typically has significant funds available to invest. A captive allows a construction company to keep those premiums and the subsequent investment income.

What are the captive caveats?

Captives aren't for everyone. They can be costly to set up and manage, and the financial benefits may take three to five years to materialize. To launch a captive and understand the insurance industry like an insider, you'll need to hire risk managers, actuaries, lawyers and business consultants. You'll also need to hire a captive manager to create policies, make investments, handle claims and run the day-to-day business of the captive.

If you operate a smaller construction company, you may find it more cost-effective to buy traditional insurance. A captive consultant can conduct a feasibility study to help you determine the most appropriate choice for you. The study will typically analyze your recent loss history, safety controls, payroll and revenue, and overall goals and objectives.

Are you ready to take control?

Contractors frustrated by increasing premiums for limited coverage are finding new ways to buy insurance. Captives not only offer you lower premiums, but they give you more control over the way risk is managed and how claims and losses are settled. *T*