

INDEPENDENT CONTRACTORS VS EMPLOYEES

Recently, many business owners, and managers, even government agencies, have had to take stock of their bottom line. The question that many face and are still coming to terms with is how to close their budget gaps. You may be reviewing these very numbers and searching for a ideas and solutions that would not cripple your business.

Which is the RIGHT FIT for your business needs?

Most companies seek solutions that would permit them to continue servicing their clients while reducing their overhead. Reducing staff, eliminating miscellaneous expenses and increasing prices are just some of the ways you can reduce your costs. Hiring an independent contractor instead of an employee can also go a long way in improving your bottom line. There is no right or wrong choice when deciding what the right fit for your business is. But when contemplating that decision, consider the following:

Federal and state regulators are cracking down on independent contractors. Construction firms should closely examine the classifications of independent contractors, as some may be construed to be employees.

It is critical that you, the business owner, correctly determine whether the individuals providing services are employees or independent contractors. Generally, you must withhold income taxes, withhold and pay Social Security and Medicare taxes and pay unemployment tax on wages paid to an employee. You do not generally have to withhold or pay any taxes on payments to independent contractors.

So you're thinking, great! That will save me money. While this may undoubtedly save you money and cut down on your overhead, make sure you are familiar with and weigh all the factors when determining whether a worker is an employee or independent contractor.

An Independent Contractor is an individual commissioned by your company to perform a specific job. Employers in these cases have the right to control and direct only the results of the work or job performed, not the methods or means those results are accomplished. In determining whether the person providing service is an employee or an independent contractor, all information that provides evidence of the degree of control and independence must be considered.

Common Law Rules

Facts that provide evidence of the degree of control and independence fall into three categories:

Behavioral: Does the company control or have the right to control what the worker does and

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BEYOND THE BID BONDS! MECHANIC'S LIEN BONDS

A lien can be placed on a property or the funds being used to improve a public project by a general contractor, subcontractor, supplier or manufacturer that is owed money for work completed or material supplied to a project.

In order for the owner to obtain a clear title or a general contractor to receive his contract funds on a public project, the owner or contractor (if a subcontractor, supplier or manufacturer filed the lien), must get the lien discharged.

One way to do this is to obtain a Discharge of Mechanic's Lien Bond.

This bond guarantees payment of any judgment that may be rendered against the owner or contractor to the lienor, while permitting:

1. The contractor to continue to receive payments for work performed on public work
2. Allows a Title Company to issue a clean title on a property that has been liened, if the owner is trying to refinance or sell his property.

By NYS statute the bond limit must be 110% of the amount of the lien. The lienor is required to bring his suit within one-year of

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CHOOSING A BUSINESS SUCCESSOR

Selecting a business successor is one of the most important decisions a business owner can make. The future of your family, the success of your business, welfare of your employees, open projects and clients all depend on selecting the right person for the job.

Consider the following when choosing a business successor;

1. Is he/she qualified or have the neces-

sary experience to perform the duties needed to run the business?

2. Do they share your vision for the company?
3. Do they have desire and qualities to lead in an emergency?
4. Is he/she aware of all open items and capable of taking over pending projects.

Often business successors are chosen be-

cause of their relationship to the owner.

An owner's children might be selected to run the company once the parent retires.

Explore your options. Select the best leader for your company. Share this information with your family. Work with your attorney to implement a procedure for both the transition and the new command of your company.

FINANCIAL STATEMENTS ARE IN...NOW WHAT?

Now that the Fiscal Year End Financial Statements (F/S) have been submitted to your bonding company (assuming that you have a 12/31 year end), it is important that your surety broker set up a meeting with the surety company to review the previous year's results and to communicate with them about your needs for this year.

For this meeting, for discussions with your broker (and banker, for that matter), and for general business purposes, you need to closely review the F/S. You do not need to be a CPA, but you do need to understand your F/S. Reviewing your F/S is more than just determining your bottom line. Read them, ask questions of your accounting staff, speak with your CPA and definitely speak with your surety broker to understand how a surety will analyze these statements.

It is too late at this point to affect the actual printed numbers. However, surety credit is based on the bonding company's analysis of these numbers. Your surety underwriter is looking at more than your

Net Worth or Working Capital. Many things that occur subsequent to your fiscal year end have an impact on your bonding program. For instance, distributions, collections of Accounts Receivable, paying down of bank lines of credit, billings and collections of under-billings, approvals of change orders, repayment of shareholder and affiliate receivables, etc. will all play a role in a surety's analysis.

The Surety underwriter, also, appreciates it when a contractor understands and can navigate their way around any F/S and their own, in particular. Work with your surety broker to determine what supplemental information might be needed to bolster your statement. A report on Subsequent collections since the Aged Account Receivables at year end or a current Contracts-in-Progress Spreadsheet can greatly help your surety credit line.

Also, understanding last year's F/S will prove to be very helpful for this year's planning. For instance, maybe your overhead factor figured into each

bid estimate needs to be revised – either upward or downward. Careful review of your statement this year can strengthen your position with your surety company and improve your competitive edge next year.

In our opinion, you should include your surety bond broker when you review the F/S with your CPA. The surety bond broker will add a different perspective to the discussion and will provide a valuable framework as you prepare for your surety underwriter meeting. Since a surety's analysis is similar to a banker's analysis, in many respects, you might find that discussion with your surety broker to be helpful prior to your meeting with your banker as well.

Your surety broker needs to be a resource to you. If you do not include them, you are not utilizing them properly. If you are inviting them in and you are not convinced they are a resource, then you need to interview other brokers. Of course, we welcome the opportunity to demonstrate our value.

LOOKING AHEAD

Contractor's for Kids Events

- On September 11, 2010 CFK's Annual Picnic at South County Park, Yaphank, NY.
- The CFK Walk-A-Thon will occur on October 3rd, 2010 at Holtville Ecology Site, Holtsville, NY.

Additional details and ticket information is available at the CFK official website, www.contractorsforkids.org under Events or call 1 (888) 208-KIDS.

TINA W. BOBAK INSURANCE PROFESSIONAL OF THE YEAR

It is with great pride that we celebrate the achievement of one of our own. Denese Thompson was awarded the 2010 Tina W. Bobak Insurance Professional of the Year award on April 23rd, 2010.

Denese is currently the Vice President/Director of Surety Operations at Atlynx Surety Brokers, LLC.

BEYOND THE BID BONDS!

MECHANIC'S LIEN BONDS

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filing the lien. The lienor is allowed to extend the lien for one additional year, but must do so before the first year is up. If no action is begun by the end of the second year, the lien is automatically cancelled. Documentation to the underwriter showing that no action has been taken will allow them to cancel the bond. However, if an action has commenced, the bond stays in force until the matter is decided by the court or arbitrator.

In underwriting these bonds, and where there was no Performance and Payment bond issued, the surety will typically require collateral for 100% of the bond amount. Since these bonds can stay in force for up to two years, the underwriter may require two years premium be paid up front. The first year's premium is fully earned. If the bond is cancelled after the first year and before the end of the second year, a pro-rated return premium will be issued, subject to the surety's minimum premium.

If you find yourself in a position that you need this bond, contact us and we will be more than happy to help you. As should be the case with any legal matter, make sure to get the advice of an attorney.

THE BASICS OF PROJECT LABOR AGREEMENTS

What is a Project Labor Agreement

A Project Labor Agreement (PLA) is a project specific, pre-hire agreement.

On a standard contract there are contracts between the Owner of the project or Construction Manager hired to oversee the project and the various contractors awarded work on that specific project. Agreements between Owner/CM, Unions and Contractors can vary and add difficulties. In New York State, under WICKS Law, there must be a separate contract for plumbing, HVAC and electrical work.

PLA's were designed to allow for efficiency in dealing with various labor unions on any single project by incorporating an agreement that allows for one standard set of terms for all involved parties. In short, every group on the project should be working under the same terms. The owner does not have to deal with the headaches of addressing each union's separate terms and conditions on the jobsite.

Public entities in our area are starting to use such agreements more and more frequently. Their goal has been to find a forum that will allow both union and non-union construction firms to bid on public projects in a fair and competitive manner. The NYS Legisla-

WICKS LAW This law applies to all state and local government projects valued over \$3 million in New York City, \$1.5 million in Nassau, Suffolk and Westchester Counties

ture felt so strongly regarding PLAs that in 2008 it reformed the WICKS Law to allow exemptions to its bidding requirements where PLAs were to be used. In short the feeling was that the PLA agreement, which is to be signed by everyone, including subcontractor trades, would allow a more cost efficient approach on prosecuting a project.

Some reasons why some Owners believe that PLAs are more cost effective are as follows:

- Uniform contract expiration dates
- Increased accuracy in the forecasting of labor costs
- Improved efficiency and increased completion times.
- Alternative dispute resolutions
- No strike, No walkout guarantee

As a contractor, whether you agree or disagree with the implementation of PLAs they seem to be here to stay. If you are considering working on a project that requires you to sign a PLA please read the agreement carefully. Not all PLAs are the same and remember they are project specific. For example, there

are usually special provisions for M/WBE contractors. A non union contractor considering a PLA might want to consider how the agreement differs from how they would normally prosecute their work on a project. Check the requirements carefully as PLA agreements usually require all (Union and non union) contractors to pay into the Collective Bargaining Agreement (CBA) for designated employee benefits funds that were part of the PLA Agreement for the specific project.

There are still arguments that PLAs might actually raise costs (i.e. by limiting amount of bidders on projects, etc...). With proponents for and against it is up to the owner to decide if using a PLA for a planned project is overall more cost effective. In an economy today that has limited projects available, your best bet is to consider all options at this time. When you come across a PLA bid just make sure you look at the requirements carefully so you are completely aware of your responsibilities on the project.

This article was produced using the following sources: Kotler, Fred B. J.D., "Project Labor Agreement in New York State: In the Public Interest", March 2009

"Everyone has his burden. What counts is how you carry it."
— Merle Miller

"Holding on to anger is like grasping a hot coal with the intent of throwing it at someone else; you are the one who gets burned." — Buddha

"Ability is what you're capable of doing. Motivation determines what you do. Attitude determines how well you do it." — Lou Holtz

INDEPENDENT CONTRACTORS V. EMPLOYEES

Which is the RIGHT FIT for your business needs?

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how the worker does their job?

Financial: Are the business aspects of the worker's job controlled by the payer? (these include things like how worker is paid, whether expenses are reimbursed, who provides tools/supplies, etc.).

Type of Relationship: Are there written contracts or employee type benefits (i.e. pension plan, insurance, vacation pay, etc.)? Will the relationship continue and is the work performed a key aspect of the business?

Some factors may indicate that the worker is an employee, while other factors indicate that the worker is an independent contractor. There is no "magic" or set number of factors that "makes" the worker an employee or an independent contractor, and no one factor stands alone in making that determination. Also, factors relevant in one situation may not be relevant in another.

The keys are to look at the entire relationship, consider the degree or extent of the right to direct and control and finally to document each of the factors used in coming up with the determination.

As with most things in life, there are consequences for doing the wrong thing. If you classify an employee as an independent contractor and you have no reasonable basis for doing so, you may be held liable for employment taxes for that employee. See Internal Revenue Code Section 3509 for more information regarding misclassifications of employees.

In considering the best fit for your company, be sure to familiarize yourself with the IRS requirements. There are specific guidelines that the IRS expects you to adhere to.

Please review the requirements on the IRS website – www.irs.gov and discuss this with your accountant.

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SURETY RESULTS 2009

The following are the results for the Top Ten Surety Companies as published by the Surety & Fidelity Association of America (000's)

		Direct Written Premium	Direct Premium Earned	Direct Losses Incurred	Loss Ratio
#					
1	TRAVELERS COS	\$924,171	\$927,563	\$48,279	5.2%
2	LIBERTY MUTUAL HOLDING CO.	\$723,212	\$769,580	\$159,925	20.8%
3	ZURICH FINANCIAL SERVICES LTD	\$486,754	\$500,527	\$18,664	3.7%
4	CNA FINANCIAL CORP	\$406,141	\$416,532	\$56,099	13.5%
5	CHUBB CORP.	\$276,997	\$294,385	\$1,557	0.5%
6	HARTFORD FINANCIAL SERVICES	\$181,038	\$194,116	\$69,480	35.8%
7	HCC INSURANCE HOLDINGS INC.	\$165,160	\$159,386	\$32,851	20.6%
8	INTERNATIONAL FIDELITY INS CO.	\$117,984	\$117,496	\$16,673	14.2%
9	ACE LTD.	\$109,049	\$107,721	\$15,261	14.2%
10	AMERICAN FINANCIAL GROUP INC.	\$104,470	\$104,029	\$22,355	21.5%

This past year has been an eventful one in the surety industry. Amongst the most exciting news was the acquisition of SAFECO Insurance Company of America, and its affiliated companies by Liberty Mutual Holding.

Letter From the Editorial Staff

This newsletter is designed with our readers in mind. All inquiries or suggestions regarding this or future newsletters are appreciated. Please send all inquiries to denese@esuretybond.com.

If you know anyone who you feel would like a copy of our newsletter, please let us know so that we can include them in our mailing list.

Check our website www.atlynx.com for past editions of our newsletter.

The Bottom Line is published bi-annually by Atlynx Surety Brokers, LLC. A service for our clients, contacts and friends, it is meant to provide advice and encourage its readers to keep up with all the latest developments. These articles are not intended to provide a complete discussion of the subjects presented.



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