

LEGAL, INSURANCE, AND CONTRACTURAL ISSUES FOR THE ESTIMATING CONSULTANT



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Business Structure

When considering the start up of a construction estimating practice, the business structure of the enterprise is usually the first concern that makes the list. It's human nature to be concerned about the ramifications of making a mistake on which another person or company makes a cost decision, so this is of course a topic of great concern. How do you protect your business and personal assets in the event that an unhappy client decides to pursue a lawsuit or other claim for a mistake you are alleged to have made? This is usually the very thing that keeps prospective entrepreneurs employed by others. Since most consultants rarely establish a more formal corporation or partnership, we'll skip these at this time and concentrate on what is prevalent. The simplest structure is a sole proprietorship, wherein the business owner is engaged in business without a corporate structure, co-owners, or partners, and the annual profit or loss of the business is treated as the income of the business owner on federal tax form 1040 Schedule C. Most consultants take this route for its simplicity and ease of doing business. Sadly, this structure provides no protection of personal assets. If such protection is desired, corporate structures such as a Limited Liability Company (LLC) or a subchapter S corporation provide separation of personal and business assets, but still allow for the simpler method of filing taxes by Schedule C. It's not necessarily difficult or expensive to establish a corporate structure, and the how-to can be found on any state's Secretary of State website.

Insurance Policies

Most firms with whom you'll do business (be it a design firm, contractor, owner, or CM firm) will require that you have a minimum of Worker's Compensation and General Liability Insurance. These policies need not be expensive, and will protect the insured from some of the financial impact of accidents, injuries, and illness while performing work related business in or out of your office, but do not cover professional liability (such as an error on a takeoff or in an estimate). Sole proprietors without employees can be exempt from Worker's Compensation, but this varies by state. General Liability usually provides coverage for the use of automobiles as well. Many consultants work from their homes, but the protection of homeowner's insurance policies won't necessarily cover acts by the insured in the performance of business activities, especially outside of the home. If you buy or rent office space, a General Liability policy is a must have. The question of need for professional liability insurance is always a hot topic for consultants. Some clients may require it, but many consultants elect to do without it. First and foremost, it is very expensive (a premium range of \$3000 - \$6000 for a million dollar policy, often with a minimum deductible of \$5000 - \$10,000), and policies specifically written for estimators are a rare thing. These policies are often referred to as "E&O" policies because they cover errors and omissions made by professional practitioners. This type of policy is required for all professions regulated by the state, such as architects, engineers, accountants, and attorneys. Estimators who chose to purchase E&O policies are usually forced to accept policies written for these other professions, and must pay the corresponding high premiums. Since construction cost estimating is an unregulated profession (no license required, no educational minimums, no permit needed to practice),

many consultants rely on disclaimers and similar contract language to waive or limit their liability, and make this policy well known to prospective clients, and often require acceptance of this fact by prospective clients as a condition of doing business.

Proposals and Contracts

Often estimating consultants are solicited by clients through a formal RFQ process that results in a formal contract or purchase order with explicit terms and conditions, but many are retained simply via email and phone calls. Although it is never a bad idea to have a written contract for every assignment, many consultants accept work on a handshake or without formal written authorization. The comfort level with a current or prospective client usually determines what services will be provided, and how and when payment will be made. Many jobs are simply billed by the hour, or by a mutually agreed upon fee. Some have ongoing, monthly assignments where a certain fee will entitle the client to a set amount of time each month from the consultant. For all first time assignments with any client, having a written agreement is always best. As mutual trust and respect is developed over time between the parties, it is not unusual for more informal solicitation and acceptance of assignments to become the norm, along with modified or variable payment terms. It's also a wise expenditure to have an attorney draft standard contract and/or disclaimer language that is made part of every proposal and contract. ***In all cases, especially informal ones, it is strongly recommended that there be zero ambiguity when it comes to payment terms.***

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It is the sole responsibility of the consultant to make certain his or her client is aware of and accepts the expectations and requirements for payment. For more information on the topic of getting paid, see Carl Cathcart, CPE's excellent article in the December 2013 edition of Estimating Today.

Some assignments, such as expert witness work, work with public agencies, pro bono work, and work with large corporations usually have a more formal contract structure and well defined terms and conditions and payment terms.

Estimating consultants working for contractors on projects already under contract for the contractor may entitle the estimator to subcontractor status on that project. If so, the lien rights of that particular state should be known to the consultant in the event that the filing of a lien on the project becomes necessary to obtain payment.

We hope that this article gives you some insight into what is needed to keep your consulting business going, as well as some insight into becoming an independent cost estimating consultant. **EI**

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