

## Part 2

## Purchasing an existing construction company — a smart business move?



### Construction Law

By PAMELA J. SCHOLEFIELD

#### Discussion from last article:

I had a contractor who was interested in purchasing an existing construction company.

They were being guided by a business broker who had not exactly provided good advice thus far. The for-sale company was a general contracting firm, while the purchaser was only a concrete contractor.

The attraction to this business was that the general contracting firm was fully functional and was a turnkey operation.

The sale would include all trucks and equipment, building lease, yellow-page advertisements and some employees who want to stay on with the new owners, and all current business licenses, including his general contractor's license.

The owner will help train the buyer's personnel for a month or so since the buyer only currently does concrete work.

As another big attraction, there were several pending projects that would become part of the purchase. In last week's discussion, I touched on some of the potential pitfalls regarding purchasing this business, including restrictions of transferring a contractor's license, license qualifier requirements, and business entity restrictions (i.e. a limited liability company cannot obtain as contractor's license).

I also provided some ideas that could help a specialty contractor ease into general contracting without violating the law.

#### Additional concerns

There is more to consider in this purchase decision than licensing,

qualifiers and business types. It is extremely important to understand exactly what you are purchasing when it comes to taking over an ongoing business.

For example, your purchase could be for the entire business, and, rather than just purchasing the assets and taking over existing contracts, you may end up taking on the liabilities of this company as well.

Thus, depending on how you arrange the purchase, you would end up with both the good and the bad.

If you end up purchasing the entire company, assets and liabilities, you need to recognize problems that the company may have related to past projects, such as failure to pay subs and suppliers.

Claims of these types have up to a four-year statute of limitations, and may not surface for some time after the purchase.

The same goes for claims from an owner of a past project, such as for damages due to delays caused by the general contractor.

Again, if these are breach of contract claims, then they may not surface until four years after the fact.

More of a concern would be construction defect claims for latent defects.

You could end up being liable for the work this seller had done almost 10 years ago.

Also, you could end up being at risk for another 10 years for work the seller completed just before you purchased the business.

An investigation into the insurance coverage that the seller has (or had) needs to be done to see the extent of coverage for the prior projects and whether that coverage will transfer with the sale.

This may depend on the type of business entity the seller is.

Because of these risks, you need to make sure you have very good counsel on how this business transaction should be handled and documented.

Also, make sure you have some sort of indemnity agreement from the seller so that the seller will defend any claims brought as a result of projects done before the purchase, to the extent those claims are not covered by any insurance.

The second area of concern is the pending projects. This seller has contracts for projects not yet started, but those are contracts between the seller and the project owner.

Depending on the terms of the contract, those projects may not be assignable to another company or if the business transfers to a new majority owner.

This may not be an issue if the business is a corporation and you are buying the shares of stock, since the contracts are between the corporation and the owner. But, even with a corporation, the contract may restrict assignment or transfer to new majority owners.

Also, sometimes the project team is defined in the contract as comprising certain individuals, so those issues need to be addressed if they exist.

The same restrictions against assignment may apply to the lease as well. You must review the lease and understand its terms.

Depending on how you end up purchasing the business, you may want the landlord to provide written approval of the taking over of the lease regardless of whether or not there are express restrictions.

The leased land itself may be of concern if the business has been there for a long time because of the possibility of improper hazardous waste disposal by the seller.

This is another area where you

would not want to take on the risk of liability.

A due diligence investigation may be warranted, and even if that comes up clean, the purchase agreement should include an indemnity by the seller if this becomes a problem.

One final thought is liability for employee claims. There are various statutes of limitations for those as well and you would not want to be on the hook for those issues if you have taken over the entire company.

Again, this may be another good area for an express indemnity agreement from the seller.

As you can see, there are a multiple of issues to investigate, resolve and document as the purchase agreement is prepared.

Because of the risk involved, you really must seek the service of a competent attorney, and not just rely on the guidance of the business broker.

If you have a construction question, submit it to: [info@construction-laws.com](mailto:info@construction-laws.com)

#### Disclaimer

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**Source Code: 20080516tca**

## Brookfield homes in Cordova selling

By PRITISH BEHURIA  
*The Daily Transcript*

Affordable pricing and low tax rates. Those two features are just a couple of the attractions the townhome community of Cordova at Windingwalk by Brookfield Homes provides.

After the first 18 weeks of this year, the community is off to a quick start, already outpacing the sales of other Brookfield new home neighborhoods throughout San Diego and Riverside

counties.

"Our overall sales are up significantly over the last quarter of 2007, and unlike many have predicted, it's our first-time buyer market that's gotten out in front of the upswing," said Lora Heramb, vice president of sales and marketing for Brookfield Homes San Diego/Riverside division. "In spite of the credit crunch, and with interest rates as low as they are right now, when you factor in Cordova's low prices and current low tax rates, the

timing is perfect for these buyers — they're making the decision to buy now. Many are utilizing low down payment FHA programs, zero down VA or the down payment assistance program Nehemiah."

Cordova's two-story town homes range from 1,638 square feet to 2,024 square feet, offering three or four bedrooms and 2.5 or 3 baths. Six models of homes are available to view. Pricing begins in the mid \$300,000 range, and

Cordova offers a low 1.5 percent tax rate for a limited time.

The community of Windingwalk will include approximately 2,300 residences, community facilities, a public park, retail elements, office space, and elementary, junior high and high schools. Outdoor features on some plans include covered front porches, patios, side yards, private rear yards and ornate ironwork.

**Source Code 20080513cya**