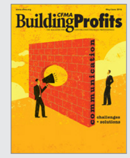


BY ROGER SWANGER & ROBERT P. BUTTS

LEVERAGE THE BENEFITS OF TEAMWORK
Between Your CPA & Attorney

Despite the need for collaboration and teamwork among construction industry professionals, the partnership between a contractor's CPA and attorney is usually considered more of an afterthought than part of a planned service delivery.

Consider this scenario involving a contractor and its CPA and attorney: A contractor needs to create a new entity. The CFM/owner calls his attorney to discuss the matter, who then e-mails the contractor's CPA to request his opinion on the tax elections. The CPA calls the attorney to request background information and raises financial questions the attorney didn't discuss with the CFM/owner.

After a dozen phone calls and e-mails, an agreement is finally reached on the entity selection. Sound familiar?

Unfortunately, this inefficient communication and "problem-solving" occurs too often. If the CPA and attorney were already working together, then the CFM/owner could schedule a telephone conference so that all three could determine the best entity option and quickly work out the details.

The CPA's decision-making is generally based on financial and income tax considerations, while the attorney's is based on legal and defense ramifications. By gaining awareness and understanding of how the CPA and attorney approach different aspects of the same problem, the CFM/owner can better leverage the professional team by having them work together.

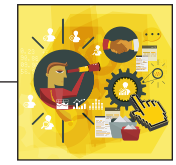
This article will illustrate the importance of getting the CPA and attorney to collaborate for the contractor's benefit and how to achieve collaboration among the team.

When Should CPAs & Attorneys Work Together?

Let's review some situations that require legal and financial perspectives to derive the best solution.

Determining Entity Type & Structure

As shown in the opening scenario, collaboration between the CPA and attorney is essential when determining entity type and structure. The CPA is concerned



with income tax ramifications while the attorney is concerned with shielding personal assets from business risk and liability. In addition, the type of owners and plans for future ownership and capital may impact the final decision.

Drafting Shareholder, Partnership & Operating Agreements

Here, the CPA is generally most concerned with financial and income tax matters (such as capital allocations, options for future capital or ownership, taxable income and loss allocations, timing and amount of distributions, dissolution allocations, and valuation of interests for buy/sell provisions). The attorney is primarily focused on the specific effects of triggered events.

Consequently, these professionals should collaborate on drafting a shareholder (for corporations), operating (for LLCs), or partnership agreement that addresses such questions as:

- What if one of the shareholders or members die? Is the estate of the deceased shareholder or member required to sell the deceased's interest in the company? Do the remaining owners have to purchase the interest, or do they merely have a first right of refusal?
- What if a shareholder or member becomes disabled? What is the definition of disabled? Is there a compelled sale and purchase or a first right of refusal?
- What if a shareholder or member leaves the company (e.g., by retiring, resigning, or being fired)?

Should any of these scenarios occur, the attorney can handle valuation and financing provisions in the operating or shareholders' agreement. Furthermore, the attorney can also address owner concerns regarding buy/sell provisions. Both the CPA and attorney can outline the rewards and risks of each of these items and determine the best solution to holistically meet the contractor's needs.

Succession Planning

While the attorney will address the questions previously outlined in the shareholder/operating agreement as well as voting control matters, the CPA will ensure that language is included to properly allocate net income and losses for income tax purposes as well as value the interests, amount, and timing of distributions.

Disputes Among Owners

Disagreements among owners are often rooted in financial matters. The CPA often has intimate knowledge of company financials and both the CPA and attorney are familiar with owner personalities and operating styles. This familiarity allows them to more easily assist with mediation before a dispute becomes more serious. This can range from getting the owners to discuss the issues to acting as an arbitrator to find a fair resolution for all parties.

Mergers & Acquisitions

Joining two business entities is an intricate process that involves numerous financial, legal, and strategic considerations – including financing, management of risk transfer, change in ownership, due diligence, and negotiations. Further, how future decisions will be made is best addressed prior to the transaction.

The CPA and attorney must collaborate and take a disciplined approach to help the contractor effectively carry out a successful M&A.

Joint Ventures & Partnerships

A joint venture has a limited duration and exists only until the particular project or endeavor is completed. Partners do not typically favor the limited liability protections that are associated with corporations and LLCs.

However, joint ventures and partnerships enjoy significant flexibility in terms of how company decisions are made, how profit is distributed, and the percentage of each partner's ownership interest.

Forming a partnership, corporation, or LLC to work on a specific project involves numerous financial and legal considerations including: control, financing, management of risk transfer, and establishing allocations of profit and loss, as well as amount and timing of distributions. A CPA and attorney can work with each partner to provide alternative solutions or assist with resolving partner disputes.

Banking Credit Agreements

Obtaining, increasing, or maintaining banking credit involves both financial and legal implications. A bank relies on financial and legal information in its decision to provide credit to a contractor.

Credit lines, mortgages, letters of credit, and other credit instruments are often essential parts of contractors' financing needs. The CPA can assist with determining the company's financing needs, while an attorney can help negotiate and clarify loan documents and loan closings.

Surety Credit Agreements

In addition, obtaining, maintaining, and increasing surety credit is a must for many contractors. Contractors are concerned about maintaining their bonding capacity as well as increasing their single job and total line bonding limits. Since it's critical for sureties to have accurate and clearly presented financial information, the CPA should assist with the financial reporting. The attorney can review the significance of the documents that the contractor must sign.

Getting the Team Together

In order to assemble the contractor's team, make sure you have the right players. Do you need a compliance-oriented CPA who primarily performs audits and prepares income tax returns? Or, do you need a CPA for such matters as bonding capacity or succession planning?

(For what to look for in a CPA, read "More Than a CPA: Selecting a Partner for your Company's Financial Well-Being" by Sam G. Clark in the January/February 2016 issue.)

The same holds true for an attorney. Do you require basic consultations and contract reviews? Or, do you need assistance creating complex contracts, negotiating settlements, and litigating amounts due?

See below for tips on selecting a construction attorney.

Tips for Choosing a **Construction Attorney**

Construction attorneys can assist with transactional matters (e.g., drafting and reviewing documents), help avoid disputes, and resolve disputes in the contractor's best interest when they arise. Here are some skill sets to consider when selecting this important partner.

The Work

A construction attorney's work primarily focuses contracts. Construction attorneys draft, review, and (when disputes arise) litigate contracts. Construction attorneys should be comfortable operating in many business-related environments, including:

- Performing real estate and loan closings;
- Drafting, reviewing, and negotiating owner-GC contracts, subcontract agreements, and insurance contracts;
- Developing subdivisions and drafting related association documents;
- Forming business entities such as corporations, LLCs, partnerships, limited partnerships, and joint ventures; and
- Drafting operating agreements for LLCs, partnership agreements for partnerships and joint ventures, and shareholders agreements for corporations.

In the event of a dispute, a construction attorney should also be comfortable handling adversarial situations (e.g., contracts, lien claims, bond claims, local governments, development rights, codes enforcement, and bid protests). The attorney should be willing to try these cases both in court and through the arbitration process. Construction attorneys should also be experienced negotiators, as approximately 85% of all cases settle before they go to trial.

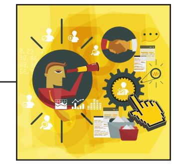
Qualifications

The construction attorney should understand how businesses operate. The CFM/owner may want to look for a construction attorney who has previously worked for a contractor. At a minimum, the attorney should specialize or be board certified in construction law, understand the construction process, and have a broad knowledge of applicable statutes and cases.

The attorney must be able to try cases. An understanding of the dispute resolution process is imperative in helping to reach a favorable settlement; if a settlement is not reached, then a willingness and ability to try a case is imperative.

The construction attorney must have the ability to analyze the strengths and weaknesses of the contractor's case based on the facts and existing legal precedence (i.e., how courts have treated similar disputes in the past). This information and analysis is used to negotiate a resolution based on the anticipated result at trial (or in arbitration if the case does not settle).

A construction attorney is a critical partner in a contractor's success. Keep experience and qualifications in mind when searching for the best fit for your team.



A contractor that needs more than a tax return preparer and contract reviewer may want to consider a CPA and attorney with a supporting firm that offers a variety of services under one roof.

Create a Plan

To maximize your relationship with the CPA and attorney, first create a structured plan that promotes collaboration, following through to ensure its successful execution. Here's how to accomplish this:

1) Assign a leader – whether it's the CFM/owner or one of the advisors. Assigning the leadership position is imperative to the team's success. The leader must proactively direct the team and help ensure projects are completed. (More on selecting the team leader is discussed in the next section.)

2) Set firm expectations for working and communicating together. This can be done on a project-by-project basis or across the board.

3) Define preferred methods of communication (such as e-mail correspondence, telephone conferences, or face-to-face meeting) as well as frequency. Determine which partners should be included in the correspondence.

4) Outline important decision points and assign responsibility.

5) Establish a timeline and deadlines for larger projects or milestones.

6) Include both the CPA and attorney in strategic meetings and important business milestones.

7) Create an environment where ideas are openly expressed and exchanged. Encourage the team to remain objective (even if contrary advice is warranted). If the team does not work well together, then reconsider and reevaluate the team members.

Designate the Leader

When it comes to assigning the leadership role to the CFM/owner, CPA, or attorney, it's best to either determine the most qualified professional or designate the person with whom the CFM/owner interacts most frequently as the leader.

On the one hand, the CPA is generally familiar with the company's financial components because he or she interacts with the CFM/owner on a regular basis to handle the company's income taxes, assist with periodic financial statements for surety and bank credit, and answer general business questions throughout the year. Through this involvement with the business, the CPA likely has a more complete understanding of the company and consequently may be in the best position to share this knowledge with the team.

On the other hand, if the CFM/owner's work involves frequent transactions (such as contract negotiations, real estate transactions and closings, owner-contractor agreements, and subcontract agreements), then the attorney may be better suited for the role.

Regardless of who is selected, the team leader creates and tracks each project's road map – the step-by-step process for completing a particular endeavor. The leader assists in moving projects forward and keeping them on schedule by holding the team accountable for tasks and due dates assigned during team meetings.

Benefits of Working as a Team

Disseminating the same information at the same time to all team members reduces misunderstandings and provides an open forum for discussion and debate.

Without collaboration, key information can easily be lost, misunderstood, or altered between team members. Harnessing the "power of many" maximizes creative problem-solving, opportunity development, and strategic thinking. It also enhances the team's understanding and commitment to the resulting solution.

A team approach allows both the CPA and attorney to spend more time talking to the CFM/owner instead of to each other, which enhances their knowledge and understanding of the business.

The CFM/owner, the CPA, and the attorney bring unique insight and distinct specialties to the table. Each professional should articulate the finer points of the legal agreements, income tax, financial situations, and operational impact to the group to ensure everyone has a complete understanding of the business.

Sharing information not only improves strategic thinking, but also helps the CFM/owner in the case of an emergency. The CPA and attorney are valuable resources for those who may need to maintain the business affairs in the event that the CFM/owner isn't available. In the end, the process provides the most efficient use of everyone's time by streamlining communication and reducing misinformation.

Conclusion

CPAs and attorneys play a pivotal role in helping contractors navigate the financial and legal challenges that define the construction industry.

The team will increase the chances of success and lower the overall costs by ensuring these professionals are not only the right fit for the company, but also work together to find solutions. This is best accomplished by engaging professionals who value working with other professionals as a team.

A collaborative approach results in better decision-making processes and improved solutions, often with less of a negative impact to the company's bottom line. ■

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Roger is an active member of CFMA, the Construction Industry CPAs/Consultants Association, the Florida Surety Association, the Builders Association of North Central Florida, and he is an annual guest lecturer at M.E. Rinker School of Building Construction at the University of Florida. He's also a previous author for *CFMA Building Profits*.

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