



Design Professionals: Is Your House in Order? by Patricia Harris, Real Estate Weekly, November 16, 2011

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Over the past few years, we have seen unprecedented levels of ownership transition activity among architecture and engineering firms. News of mergers or acquisitions of design professional firms seems to hit our inboxes on a weekly basis. Given the prolonged economic downturn, there is no reason to believe such activity is going to abate any time soon.

Not all transactions are financially driven, however; sometimes ownership transitions occur for unforeseen or unplanned reasons such as an owner's death, disability or divorce. The new legislation regarding design professional service corporations is sure to foster a spate of transactions. Whatever the reason, an ownership transfer will require that the business's entity documentation is in order. Set forth below are the major entity formalities with which a business should be compliant.

Registration with the State. Every entity must be actively registered in the state in which it is domiciled. In addition to the filings that establish the entity, there are typically ongoing filing requirements. In New York, domestic corporations and limited liability companies are required to file biennial statements. A limited liability partnership must re-register with the state every five years or

its charter will be revoked. In addition to the state in which it is domiciled, an entity must often register as a foreign entity authorized to do business in those other states in which it does business. Whether or not the business must register in the foreign jurisdiction is highly dependent on the level of business activity occurring in such jurisdiction and each state's own laws and customs, so an attorney or accountant should be consulted on the facts and circumstances of each case.

Licensing. In addition to the registrations required of any business entity, architects and engineers must pay particular attention to and demonstrate compliance with the licensing requirements (for both the entity and individuals) of their home state as well as any jurisdiction in which a project is located.

Internal Organizational Documents. When an entity is established, numerous organizational documents are generated. It is remarkable how many of them are never "completed" or remembered throughout the life cycle of the organization, and it is these incomplete or missing documents that are often the trouble-makers in an ownership transition – confirm that the entity management agreement, such as the Limited Liability Company Operating Agreement, the Shareholders Agreement or the Partnership Agreement is fully executed, both by the initial owners as well as anyone who received an ownership interest after the business was established. Were items such as corporate by-laws duly completed and adopted?

Evidence of ownership is crucial as well. Were stock certificates or other evidence of ownership duly issued? Can all current owners produce those certificates? When a prior owner's interest was terminated, were the certificates retrieved and canceled?

Required Corporate Formalities. Certain forms of entity, such as corporations, are required to hold annual meetings as a matter of law. Written evidence of these annual meetings typically enables a potential new owner to trace through the director and officer history of the entity and sometimes other business as well. In addition to showing good recordkeeping, the other reason to hold and document such annual meetings is that lack thereof can be a primary factor in the ability to "pierce the corporate veil," i.e., charge business owners with personal liability.

MWBE Documentation. MWBE status may be established both at the federal and state levels. As with licensing requirements, MWBE requirements vary from jurisdiction to jurisdiction and most require recertification or proof of continued compliance from time to time.

Other Material Agreements. Be prepared to produce fully executed copies of any active agreements to which the business is a party. This would include, at a minimum, all employee agreements, leases and bank agreements. Some of these documents, in addition to setting forth the business obligations, may require a third-party consent to any sort of sale or transition of the business.

An ownership transaction, whether voluntary or forced, comes with a certain level of stress. To have your entity's primary "housekeeping" documents in order in advance of needing them will reduce that stress. It's time to clean up!