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### WCOE

USA National Office

4401A Connecticut Avenue NW

Washington, DC 20008

Phone: (800) 788-3548

Fax: (650) 551-5584

E-mail: [info@wcoeusa.org](mailto:info@wcoeusa.org)

Website: [www.wcoeusa.org](http://www.wcoeusa.org)

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## Message from the President

By Deborah E.G. Wilder

This last month there seems to be a lot on the political horizon. New legislation sponsored by Congressman Paul Kanjorski H.R. 3854 seeking to create a national subcontractor listing requirement (thus preventing bid shopping after the general contractor has been selected). Also, there is a ground swell in Congress to repeal an earlier law passed by Congress (effective 2012) which would mandate the government withhold 3% of the total contract price on all federal contracts for the IRS. HR 1023 by Congressmen Meek and Herger would repeal the 3% withhold. So, before the holidays engulf you, please take a minute to go to [www.thomas.gov](http://www.thomas.gov), locate your member of Congress and ask them to support both HR 3854 and HR 1023.

Some of you may remember Proposition 209 in California. It was the constitutional amendment which banned all affirmative action in California. It not only banned all quotas, it also banned all outreach and any type of good faith effort to include women and minorities in the bidding process. Well, Colorado is their next target. It is important that we defeat this proposed initiative. WCOE has always been opposed to quotas. However, outreach and inclusion in the bidding and contracting process is a good thing. We all still have to have a competitive price and do good work to get the job, but without some effort to make sure we are included in the competition, we will face even greater challenges in our businesses.

Finally, presidential primaries will be here sooner than you think. With 21 primaries set for February 5 and several before then (Iowa, New Hampshire and South Carolina), those of you interested in participating in the presidential race, need to step up and get involved RIGHT NOW with the candidate of your choice. I want to be sure that whoever is elected to the White House in 2008, WCOE has connections.

Wishing all of you safe travels and good times with your family and friends over the Thanksgiving holiday.

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## Quote of the Month

*"I believe people run marathons every day of their lives in one way or another, and we need to remember to give ourselves the finishers' medals we deserve."*

--[Zoe Koplowitz](#),

# The Immigration Reform and Control Act New Forms, Rules, and Requirements

By Caryn A. Boisen  
Larson King, LLP

The number of foreign immigrants in the United States is increasing. United States Census Bureau estimates that the percentage of foreign-born individuals living in the United States has increased from nine percent of the total population in 1994 more than twelve percent of the total population in 2006. With ever-increasing numbers of immigrants living and working in the United States, it is more important than ever for employers to make sure they are complying with the provisions of the Immigration Reform and Control Act.

The Immigration Reform and Control Act, which is codified at 8 U.S.C. § 1324a, was enacted by Congress in 1986 and signed into law by President Reagan. Its purpose was to reduce the number of illegal immigrants in the United States by penalizing employers who hire such immigrants. Under the Act, it is unlawful for an employer to: (1) knowingly employ an alien who does not have proper work authorization; (2) employ any person without properly verifying his or her work authorization; and (3) accept fraudulent documentation of work authorization.

## **Knowing Employment of Aliens without Proper Work Authorization**

An employer may not knowingly recruit, hire, or continue to employ any alien who is not lawfully admitted for permanent residence or not otherwise authorized to work in the United States. The Act further prohibits an employer from obtaining the labor of an alien through an indirect means (e.g., through a contract or subcontract) knowing that the alien is unauthorized. An employer who hires an unauthorized alien referred to it from a state employment agency does not violate the Act if the employer received and retained documentation from the agency certifying that it complied with the provisions of the Act.

If an employer hires an employee who is an unauthorized alien, the employer's only defense is that the employer did not know and should not have known about the unauthorized status and that the employer complied with the Act's employment verification requirements. A presumption of constructive knowledge is created if an employer does not attempt to comply with or improperly complies with the employment verification requirements. It is therefore essential for employers to verify employment status for all employees

An employer found to have knowingly hired an unauthorized alien will be ordered to cease and desist from such violation and may be assessed a penalty for each unauthorized alien. Repeat offenders also risk criminal penalties. An employer engaging in a pattern or practice of violations may have its unlawful activities enjoined and be fined up to \$3,000 in criminal penalties for each unauthorized alien, imprisoned for up to six months, or both.

## **Employment of Persons without Proper Verification of Work Authorization**

An employer may not hire, recruit, or refer for a fee an individual without properly verifying the individual's identity and authorization to work in the United States. A Form I-9, Employment Eligibility Verification Form, must be completed by employers and employees in order to comply with the verification requirements.

For the first time in 16 years, the federal government has made major changes to the I-9 Form. The Department of Homeland Security has announced that the new I-9 form to verify new hire eligibility requirements will be released in the coming weeks. The new form will include changes to reflect current employment eligibility verification requirements.

It is important to note that proper verification must be obtained from each employee regardless of whether the employee is an alien, an unauthorized alien, or a U.S. citizen. The employer must: (1) physically examine identification documents to verify that each job applicant is authorized to work in the United States; (2) complete an I-9 Form for each employee hired; (3) retain the I-9 Form for each employee for three years after the date of hire or one year after the employment is terminated, whichever is later; and (4) update and/or re-verify employment eligibility before the employee's work authorization expires. An employer satisfies the verification requirements of the Act if it examines the documents and they reasonably appear to be genuine.

On September 30, 1996, President Clinton signed into law some changes favorable to employers. Before, employers were subject to monetary penalties for paperwork irregularities in the Form I-9s. Now, "technical or procedural" violations in the completion of I-9 Forms will generally not result in immediate fines if the employer has made a good faith effort to comply with the Act. Once the employer receives notice of the defects, the employer has 10 business days in which to correct these defects.

An employer found to have failed to comply with the employment verification requirements will be subject to a civil penalty. In determining what amount of penalty to impose for failure to comply with verification requirements, several factors are considered, including the size of the business being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations.

## **Accepting Fraudulent Documentation**

Under the Act, an employer may not knowingly use, possess, obtain, accept, or receive any forged, counterfeit, altered, or falsely made document or a document lawfully issued to a person other than the possessor, in order to satisfy the verification requirements of the Act. Because an employer is prohibited from knowingly using such documents, the employer's good faith and reasonable compliance with the Act's requirements will be essential to its defense

If an employer accepts fraudulent documentation, the employer may be ordered to cease and desist and may be assessed a civil penalty. As mentioned above, the Act was amended in 1996 so that technical or procedural violations in completing Form I-9s will not automatically result in monetary fines in most cases.

## **New Department of Homeland Security Regulations**

New regulations issued by the Department of Homeland Security would have implemented a new requirement on employers effective September 14, 2007. The new requirement would have forced employers to verify the Social Security numbers of their employees with the federal government.

*Continued on Page 3*

## Discount to WCOE Ecobuild Fall Conference Dec 10-13, 2007

Does sustainable, Green and High Performance Solutions for the built environment interest you? If so, you may want to attend the Ecobuild fall conference Dec. 10-13, 2007 at the Washington Convention Center, Washington DC. Early Discount prices available to WCOE members prior to Nov. 9<sup>th</sup>. A pass to the Exhibit Hall and keynote speakers is only \$25. Stop by WCOE's booth at the Expo Center. For more information or to register go to [www.ecobuild.com](http://www.ecobuild.com).

## New Contract Documents to Set the Standard

For years, AIA documents have set the standard, but no more. Consensus Docs now reflects the best of industry negotiations, sample contracts and construction documents. Groups such as AGC, ABC, ASA, NECA, and others have worked to create contracts, subcontracts and other construction documents fair to all.

For more information go to: <http://www.consensusdocs.org/>

WCOE Members are entitled to a discount. For discount, call us or e-mail us at [info@wcoeusa.org](mailto:info@wcoeusa.org)

## Upcoming Events

**Eco Build Conference- Dec. 10-13 - Washington DC**

[www.ecobuildfall.com](http://www.ecobuildfall.com)

**Discounts to WCOE members who register before November 9, 2007.**

**World of Concrete- Jan 21-25**

**Las Vegas, Nevada.**

**Stop by the WCOE Booth in the Exhibit Hall**

**ABC Annual Conference- Puerto Rico**

**March 5-8**

[www.abc.org](http://www.abc.org)

**SAVE the DATE**

**WCOE Annual Meeting March 16-18**

**Willard Hotel Washington DC**

(If you know of events, that you would like to see added to this section of the Turning Point, please email the information to Ginny Douglas, Executive Director at: [info@wcoeusa.org](mailto:info@wcoeusa.org))

## The Immigration Reform and Control Act New Forms, Rules, and Requirements

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If a Social Security number did not match up with an employee's name, the employer would receive a "no match" letter from the Social Security Administration. The employer would then have up to 90 days to clear up any good faith discrepancy (i.e., clerical errors, transposed numbers, inaccurate spelling of names, etc.) or employees would have to be fired.

The plan to issue the "no match" letters was announced in August. The government had about 140,000 letters ready for employers by September, when they were scheduled to be released. Each letter contained the names of 10 or more employees with mismatches in their records. About 8 million employees would have been affected.

On August 29, 2007, the AFL-CIO, the American Civil Liberties Union, the National Immigration Law Center, and a group of labor and trade councils filed a lawsuit in the U.S. District Court for the Northern District of California about the new requirements. The plaintiffs said that because the Social Security Administration's database is full of errors, many citizens and legal immigrants could end up losing their jobs because of how employers must respond to the new rule when receiving "no match" letters. The plaintiffs also argued that Homeland Security exceeded its authority by improperly seeking to use confidential information from the Social Security Administration as tools in the enforcement of immigration laws.

On August 31, 2007, the court granted a nationwide temporary restraining order delaying implementation of the new regulations on the "no match" letters. On October 10, 2007, the court issued a temporary injunction stopping the implementation of the new regulations. The court said the proposal would impose hardships on businesses and their workers. Employers would incur costs that the government has not evaluated, and innocent workers unable to correct mistakes in their records in time would lose their jobs.

The injunction blocks the implementation of the regulations until the lawsuit is resolved or an appeals court overturns the judge's decision. Unclear whether the government will appeal the ruling or modify the regulations.

### Conclusion

Failing to comply with the requirements of the Immigration Reform and Control Act can have serious consequences for employers. All employers should consult with their human resources professionals and their attorneys to ensure they are in compliance with the current requirements.

## Selling Your Business: How the Process Works

By: Don Naideck and Bill Blumberg  
Prime Investments

One of the first business sales we ever worked on was a \$30 million dollar a year lighting distributor. The lead came in from a cold call. The seller was very secretive – he wouldn't give us any information over the phone – he wanted to meet us first. This was almost 20 years ago – before the age of websites and instant on-line reports. As we drove to meet him, I kept thinking that we were wasting our time, that the gentleman was probably selling light bulbs out of his trunk. When we arrived at our destination, we were pleasantly surprised to have pulled up to a large, modern building with the gentleman's name in two foot block letters over the front entrance.

The owner turned out to be a very sophisticated and savvy businessman. He was a hands-on owner, completely knowledgeable about his industry, international trade mechanisms, finance and management. He wanted to sell his business and retire. But he had no clue as to how to proceed. He needed a business sales professional to educate him about the process, package his business for sale, locate the right buyer, put the deal together and see the deal through to closing.

Almost 20 years later, this owner is still typical of most business owners. No matter how sophisticated and successful they are, today's owners often have little or no knowledge of how to go about selling their businesses. If you are thinking of selling, the following primer on the basic issues and process might get you started on the right foot.

### *Why do people sell their businesses?*

"Retirement" is the first answer that comes to mind when most people are asked this question. We find, however, that only a small percentage of business sellers are of traditional retirement age. Many successful owners sell while in their 40s or 50s. They want to turn the value of their business into cash while they are still young enough to enjoy their lives, spend more time with their families, travel, or, perhaps, begin a new business venture.

### *How long does it take to sell a business?*

It typically takes six to 12 months to sell a business. Even if you had a buyer in hand today, the process, including Letter of Intent, due diligence, purchase contract negotiations, financing and settlement, takes a minimum of four months. And that's if there are no problems - if the deal doesn't fall apart so you have to start at the beginning with a new buyer.

### *Is there a market for businesses?*

Absolutely. Just as there is a market for the goods or services your company provides, there is a market for businesses for sale. And, just as in the market you compete in, prices are defined by a competitive market.

### *Do most buyers target a specific type of business?*

No, most buyers are interested in broad categories, like service or construction trades or distribution, and then limit their search by geographic and size considerations.

### *What kind of businesses do buyers avoid?*

Buyers avoid businesses where there is a substantial risk that the business's goodwill will not transfer. The goodwill might not transfer for one or more of the following reasons: unstable customer concentration (one or two big customers whose loss would cripple the business); the business is really a personal service business (where the knowledge and relationships necessary to conduct the business reside exclusively with the owner); or external risk factors, such as increased competition, impending loss of a valuable location, technological obsolescence, etc.

### *Why do people buy businesses?*

1) To make money. 2) To make money. 3) To make money. Whether buyers are individuals, equity funds or other businesses, they buy businesses to make money. Of course, many also want the freedom to

succeed or fail on their own merits that business ownership offers. In the end, however, buyers are paying for the right to step into your shoes and make as much (and hopefully, more) money as you do.

### *How are businesses valued?*

Buyers buy businesses to make money. It is not surprising to learn then that businesses are valued based largely by how much money they make. Other factors that influence the valuation include the type of business, recent trends in the individual business and in its industry, assets and or liabilities included in or excluded from the transaction, geographic desirability and the existence of risk factors such as those listed above.

### *Is the valuation based upon taxable income?*

Valuations typically use formulas that include the corporate taxable income and also include other benefits that the owner takes from the business, including the owner's salary, interest on debt that won't transfer, non-economic depreciation and amortization, one-time non-recurring expenses, pension contributions and other benefits accruing to the owner, and the owner's discretionary expenses paid for by the business that are not related to the actual operation of the company. This bundle of owner's compensation items is called the "owner's discretionary cash flow" or "Adjusted EBIDTA" – Earnings Before Interest, Depreciation, Taxes and Amortization.

### *Should you use a broker to sell your business?*

Yes. Although we may be prejudiced, we believe very strongly that it is in the owner's interest to use an intermediary. An intermediary packages your business and presents it in the best light to obtain the highest possible price. He maintains confidentiality and fields all inquiries away from the business premises. He finds the best possible buyer for your particular business. He minimizes the amount of time you need to spend on the sale so you can concentrate on running your business. He resolves differences between the buyer and seller before they become personal. He helps secure financing. He keeps the deal on track and moving forward to settlement.

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# LIABILITY FOR CONSTRUCTION CLAIMS

by Margery Newman

## I. INTRODUCTION

The construction industry is rife with situations in which one party may become liable to or for another party in the construction process. The easy relationships to define are:

- 1) the liability of the general contractor to the owner;
- 2) the liability of the subcontractor to the general contractor;
- 3) the liability of the architect to the owner; and
- 4) the liability of the surety for the default of its principal.

The liability to and for the acts of subcontractors are generally defined by the subcontractor's contracts. There are situations, however, that arise where liability or responsibility for a subcontractor's acts are not so clearly defined.

## II. LIABILITY OF GENERAL CONTRACTOR FOR ACTS OF ITS SUBCONTRACTORS

The general conditions document most recognized in the construction process is AIA Document A201. Subcontracts generally adopt this document by reference. There are several sections that define the general contractor's liability for the acts of its subcontractors.

### A. LIABILITY FOR SUPERVISION

The general contractor has the obligation to supervise and direct its subcontractor's work. The contractor is also responsible for and has control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the work under the contract. Since the general contractor is responsible for the means and methods of performance of the construction work, it follows that the general contractor is responsible for the work of its subcontractors.

The general contractor is also responsible for discipline at the work site. Specifically, the contractor must enforce strict discipline and good order among the contractor's employees and other persons carrying out the contract. The contractor must not permit employment of unfit persons or persons not skilled in tasks assigned to them.

In order to protect itself against its subcontractors' defective work or default, the general contractor will include clauses in its subcontract that allow it to (1) terminate a subcontractor, (2) complete the subcontractor's work and (3) hold the subcontractor liable for any excess costs incurred.

An owner who has a claim for defective work will file suit against the general contractor. The general contractor will then sue ("third party in") each subcontractor that performed the defective work. For example, in *Wells v. Minor*, 219 Ill. App. 3d, 32, 578 N.E. 2d 1337 (4<sup>th</sup> Dist. 1991) purchasers of a new home sued the general contractor for defects in the construction. The contractor then filed a third party complaint against the concrete subcontractor who, *inter alia*, poured the foundation.

### B. OBLIGATION OF GENERAL CONTRACTOR TO COORDINATE SUBCONTRACTORS

Besides being responsible for the acts of their subcontractors, general contractors also have an obligation to coordinate their subcontractors' work. General contractors generally prepare construction schedules to meet the owner's desired completion date. The right to direct the general progress of the work implies an obligation on the part of the general contractor to keep the work in a state of forwardness. This allows each subcontractor to perform its work within the required time.

General contractors have taken to "pass through" the obligation for coordination to their subcontractors. It is not unusual to find clauses in subcontracts that state:

The subcontractor shall coordinate its work with adjacent work and shall give due notice to other subcontractors of precedent or intersecting work to assure that all items are installed at an agreeable time and to facilitate the general progress of the work.

When there are multiple prime contractors (instead of one general contractor), then the owner usually becomes liable for coordination. In *Amp-Rite Elec. Co., Inc. v. Wheaton Sanitary Dist.*, 143 Ill. 2d 635 (1992) the defendant, Sanitary District, was held to be liable for coordination, even though one of the prime contractors was assigned the duty of coordination.

## III. CONCLUSION

On construction projects several different parties may have liability for the acts of others. It is important to know not only your own risks, but the risks you may be assuming for the acts of others.

## Selling Your Business: How the Process Works

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### ***How do you choose a broker?***

Selling a business is a delicate and complicated matter that needs to be guided by a hands-on, experienced professional. The first rule in choosing the right broker is to choose a broker who is local. The broker needs to be there, in person, to guide the process, attend meetings, assess personalities, anticipate and solve problems, hold hands, negotiate, cajole, etc. - to do whatever is necessary to get the deal done. A broker's work simply cannot be "phoned in".

The second rule is to meet the broker in person before you make your decision. Are you comfortable with this person? Do you believe this person will represent your business in a professional manner? Does he understand what you are trying to accomplish by selling your business? What is his plan for selling your business? Can you see a sample prospectus? How does he find potential buyers? Does he charge a fee up front or does he get paid only when the sale is completed? You can't ask too many questions.

The third and final rule is to ask for and check three to five references. They should be from recent sales of businesses that are similar in size and type to yours. You don't want your broker to be "learning on the job" with your transaction.

### ***What should the business offering package or "prospectus" contain?***

A good prospectus should contain a history of the company for sale, an overview of the industry, an explanation of the company's particular niche (including sources of revenues, types of customers, etc.), an overview of the business's organization, a review of the operations (the nuts and bolts of how the company actually functions), information about the competition the company faces, a summary of the historical financial results of the company, information about the assets that will transfer to the buyer and a section devoted to the growth potential of the company. A good prospectus should not be a fill-in-the-blank "boilerplate," but should be written specifically for the business it describes.

### ***Who should receive the prospectus?***

Only qualified (financially and by ability) prospective buyers who have signed strict Non-Disclosure Agreements prohibiting them from disclosing information to anyone except their lawyers and accountants.

### ***Should you pay money for the prospectus?***

No. While some brokerage firms charge 30, 40 or even 50 thousand dollars to package a business for sale, other firms work exclusively on a "success fee" basis - earning their fee only when the business is actually sold. The firms that charge large up-front fees often secure their clients by making extravagant claims about the prices they can achieve. One of these companies was recently the defendant in a large class action lawsuit. The company was required by the court to return much of the up-front money it had collected from businesses it never sold. Instead of being taken in by wild promises, it is smarter to choose a broker that has the confidence to work on a "success fee" basis and that has a track record and local references that can be verified.

### ***What happens after the prospectus has been prepared?***

After the prospectus has been prepared and reviewed by prospective buyers, interested buyers may want to meet with the owner, view the business site and obtain more detailed information.

In order to maintain confidentiality, meetings should occur away from the business premises. Any on-site tours should occur after all employees have gone home.

### ***Should the fact that you are trying to sell your business be kept confidential?***

Absolutely. While some owners understandably feel an obligation to their employees to let them know what is going on, we have found that no good can come of telling employees that their company is for sale before the sale is actually consummated. If an employee finds out his company is for sale, he might start looking for another job, fearing the new owners will replace him. If vendors find out you are for sale, they might put you on COD. If competitors find out you are for sale, they might use that information against you in the competitive marketplace. Employees should be told of the sale in a post-closing company meeting, where the new owners are introduced. At that meeting, the new owners typically assure everyone that their jobs are safe (their jobs really are safe - buyers typically are very concerned about retaining existing employees, without whom the business would have little, if any value) and that they intend to grow the company, creating opportunities for everyone.

### ***What does an offer look like?***

Offers typically come in the form of a Letter of Intent. A Letter of Intent is a short, non-binding document that spells out the basic terms of the proposed transaction. It usually proposes that closing be contingent upon executing a formal Purchase Agreement, upon the buyer obtaining the necessary financing and upon the buyer's successful completion of its due diligence study.

### ***What is due diligence?***

Due diligence is a short period of time in which a buyer who has a Letter of Intent that has been accepted by the seller and who has placed a deposit with the broker can examine the books and records of the seller to determine whether he wants to proceed to a final, binding Purchase Agreement. During this time the business is typically "off the market" for other buyers. Although buyers sometimes ask for as long as 90 days to complete their due diligence, we strongly recommend that due diligence last no longer than 30 days. There simply is no reason to allow the business to be kept off the market for longer than that.

### ***What is a Purchase Agreement?***

The Purchase Agreement is the binding, legal document that describes and controls the transaction. It usually has exhibits appended to it, such as the business's financial statements and other documents, which become part of the contract and settlement package.

### ***Do I need a lawyer and accountant?***

A lawyer should be retained to review the Purchase Agreement. An accountant should be consulted to ensure that the sale is structured in the manner most beneficial to your tax situation.

### ***When do I get my money?***

At closing. The current lending environment is very favorable to business transactions. As long as your company is stable, profitable and has good financial records, you should be able to be "cashed out" at closing.

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## Selling Your Business: How the Process Works

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### ***What happens after closing?***

That depends on the needs of the parties involved. At a minimum, the seller stays with the company for a month or two after closing to train the buyer and familiarize him with the clients and business practices and procedures. Sometimes, if both parties desire, arrangements are made wherein the seller stays with the company on a longer-term basis. For example, we have seen several sellers who were happy to stay on in a sales or operational capacity so long as they had no administrative responsibilities.

### ***Is this a good time to sell?***

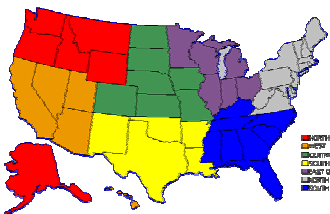
The decision to sell a business is a very personal one, often relating to quality of life issues for the owner and his family. That being said, it is an extraordinarily good time to sell a business. The economy is strong. Interest rates are still low. The lending climate is favorable. And, of course, capital gains tax rates (which most business sellers can take advantage of) are at a historical all-time low of 15%.

Selling a business is the end of one journey and often the beginning of a new adventure. The business being sold often represents the bulk of the seller's estate and the monetary value of the seller's life's work. The sale shouldn't be rushed, but should be handled in a deliberate manner with proper professional help. The business should be prepared and packaged in a manner calculated to achieve the highest attainable price. The selling process should be managed in a way that maintains confidentiality and doesn't interfere with day-to-day operations of the business. The transition to new ownership should be structured in a manner that ensures the continued health and viability of the business for both the employees and the new owners.

When handled correctly, the sale of a business can give the seller the money needed to start the next phase of his life, whether it leads to retirement, more time with family, the pursuit of other interests or a new business venture. Although, at the closing, many sellers have mixed emotions about giving up their cherished "baby," after the sale most sellers are soon exhilarated by their new found freedom and prospects for life's next adventure.

**Prime Investments is the Mid-Atlantic area's leading seller of privately-held businesses. For more information contact Prime Investments at (610) 977-2430 or (240) 290-5000 or visit their website at [www.primeinvestments.us](http://www.primeinvestments.us).**

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### **Nancy Goshow**

Northeast  
Goshow Architects LLP  
Managing Partner  
New York, NY

### **Rosana Privitera-Biondo**

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President  
Kansas City, MO

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East Central  
Scale Construction, Inc.  
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Chicago, IL

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Southeast  
Rock Spring, GA

### **Sandi Sinicrope**

Western  
ASF Interior Redesign Inc.  
Alhambra, California

### **Caryn Boisen**

National Regional Director  
-at-Large  
Larson King, LLP -Attorney  
St. Paul, MN

## Executive Committee

### **Deborah E.G. Wilder**

WCOE President  
[deborahwilder@wcoeusa.org](mailto:deborahwilder@wcoeusa.org)

### **Arnice Lamb**

WCOE Senior Vice President  
[arnicelamb@wcoeusa.org](mailto:arnicelamb@wcoeusa.org)

### **Theresa Kern**

WCOE Vice President  
[info@wcoeusa.org](mailto:info@wcoeusa.org)

### **Kristine Cook Lindsey**

WCOE Secretary  
[info@wcoeusa.org](mailto:info@wcoeusa.org)

### **Dorothy Erickson**

WCOE Treasurer  
[info@wcoeusa.org](mailto:info@wcoeusa.org)

### **Contact Information**

Contractor Compliance  
& Monitoring, Inc.  
President  
Belmont, CA  
P: 650-551-5583

The Walt Disney Company  
Supplier Diversity Manager  
Burbank, CA  
P: 818-567-5567

MA Steel Erectors, Inc.  
President  
Worth, IL  
P: 708-597-5810

CEI Group  
VP & General Council  
Howell, MI  
P: 517-548-0039

San Ramon, CA  
P: 925-964-1880