

To Joint Venture or Not to Joint Venture...

Keys to a Successful Joint Venture Project

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Agenda/Objectives

- Joint Venture Overview
- Reasons for Using a Joint Venture
- Risks associated with Joint Ventures
- Considerations and Solutions
- Keys to Success – Summary Checklist (HANDOUT)

ASK QUESTIONS!



What is a Joint Venture?

- Two or more firms join forces and pool resources to undertake a specific commercial enterprise
 1. Mutual right of control
 2. Community of interest
 3. Sharing of profits
 4. Sharing of losses and expenses
- ~~Partnership~~ – specific project v. general business
- ~~Consortium~~ – sharing of risk v. silos of risk
- ~~Teaming~~ – prime contractor / subcontractor relationship





Legal Principles

- Joint and Several Liability - each responsible for acts of the other
 - ▣ Balance sheet exposed to acts of the other participants
 - ▣ Owner may honor risk sharing, or may insist on single point of contact
 - ▣ Liability to extra-contractual third parties is still joint/several
- Fiduciary Relationship – duty to deal in good faith and trust
 - ▣ Duty to disclose information about the business
 - ▣ No self-dealing to detriment of JV
 - ▣ Share business opportunities



Corporate Structure

- Corporate Entity - single purpose entities insulate JV partners from risk.
- Financial – allocate profits, allocate expenses, wind-up and reconcile when project is over
- Operating Agreement / Partnership Agreement – risk / reward sharing is reallocated in agreement.
 - ▣ Cross-indemnities protect members, but only as strong as the financial strength of indemnitor
 - ▣ Scope of work, delegation of responsibilities, management and voting
 - ▣ Financially strong member backstops performance of weaker member



Why Use it?

- Bidding Advantage
- Collaboration and Shared Experience
- Geographic Expansion
- MBE/FBE/SBE compliance
- Enhance Bonding Capacity
- Spread Risk / Combine Financial Resources
- Lack of In-house Specialty





What Causes Problems?

- Bad Fit
 - ▣ Cultural Differences
 - ▣ Administrative Inefficiencies
 - ▣ Skills Gaps or Overlaps
- Skimpy Contracts
 - ▣ Missing Key Terms
 - ▣ Not Enough Detail
 - ▣ No Close Out or Wind-Up

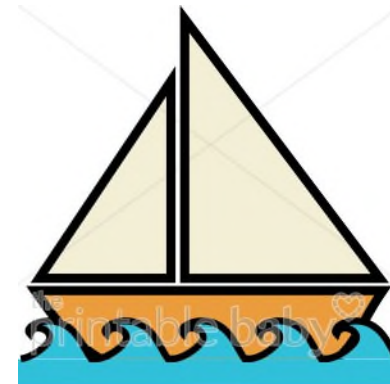


SOLUTIONS?



The Keys to Success

- Careful Planning and Due Diligence
 - ▣ Investigate Partner
 - ▣ Evaluate Project Risk
 - ▣ Consider Corporate Structure
- Fair and Collaborative Contracts
 - ▣ Risk Management and Liability Allocation
 - ▣ Process Management
 - ▣ Wind-Up and Close Out
- Effective Corporate Structure





Planning / Due Diligence

1. Evaluate Your JV Partner

- ▣ Done business in the past?
- ▣ Participated in JVs?
- ▣ Claims history?
- ▣ Insurance / bonding capacity
- ▣ Geographical footprint
- ▣ Skill set, expertise
- ▣ Administrative processes / capabilities
- ▣ Financial capability





Planning / Due Diligence

2. Evaluate Project Risk

- ▣ Owner's Experience with JVs
- ▣ Size / Complexity of Project
- ▣ Segregated Specialty Work
- ▣ New Type of Work
- ▣ Long-Term Risk Potential





Planning / Due Diligence

3. Evaluate Corporate Structure / Insulation Options

- ▣ No Separate Entity – JV participants retain corporate structure
- ▣ Affiliate Entities – JV participants form subsidiaries that agree to Operating Agreement
- ▣ Single Separate Entity – create a “single purpose entity”, with stock held by the JV participants
- ▣ Consider tax consequences
- ▣ Consider local requirements
- ▣ Consider licensing requirements





Contract Considerations - General

- Purpose of the Joint Venture – specific project
- Methods of management of the project
- Specific scope of work and obligations of parties
- Legal liability allocation and limitation
- Risk management and insurance
- Tax considerations



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Contract Considerations - Business

- Management / Decision Making
 - ▣ Majority / Minority Members, representatives
 - ▣ Day-to-day authority
 - ▣ Member vote for important matters (% allocation)
- Maintaining Books and Records / Auditing
- Financial Processes (joint checks, signing authority)
- Competition
- Confidentiality
- Cost of construction – which costs are reimbursable?





Contract Considerations - Legal

- Liability Allocation – joint and several will apply unless otherwise specified
 - ▣ Cross Indemnification - members indemnify each other for their particular scope of work (“guilty party pays”)
 - ▣ Share risk based on percentage of investment (“risk v. reward”)
 - ▣ Limitation of Liability – members agree to limit overall risk
- Mitigate Fiduciary Duties
 - ▣ Limit disclosure obligations
 - ▣ Allow participants to sell equipment or services to JV, but create “arm's length” transactions standards
 - ▣ Specify scope of shared business opportunities



Contract Considerations – Legal (cont.)

- Disputes and Claims
 - ▣ Mediation + Arbitration
 - ▣ Choice of Law and Forum (parties from different states)
- Duration and Termination - generally for specific project, limited duration – but can be used for ongoing projects with proper drafting
 - ▣ Withdrawal
 - ▣ Prohibition on assignment
 - ▣ Winding Up (distributions, warranty periods, insurance issues)
- Default and Nonperformance
 - ▣ Expulsion and Replacement of Defaulting Party



Contract Considerations – Legal (cont.)

■ Insurance and Bonding

- ▣ Some policies include JV coverage, others do not, some carriers resist
- ▣ Project policies can segregate risk from corporate policies
- ▣ Separate procurement (one provides CCIP, the other provides SDI)
- ▣ Sharing of deductibles
- ▣ Claims management
- ▣ Additional Insured, Named Insured, Loss Payee status
- ▣ State of Ohio / OFCC will accept individual coverage with JV protection, or a separate project program



Questions?



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