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

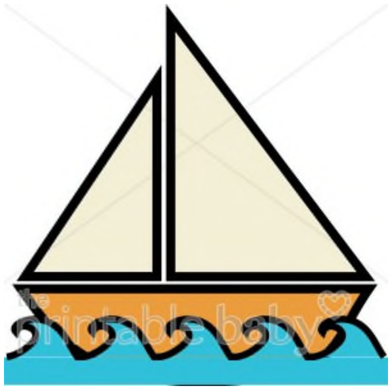
What Causes Problems?

- 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

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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KEYS TO JV SUCCESS – CHECKLIST

A. Pre-contract Planning and Due Diligence

- Evaluate Potential JV Partner
  - ✓ What is your experience with the potential JV partner? Worked on projects together in the past? Is it your first time in a JV, or your potential partner's first time?
  - ✓ Review potential partner's claims history, insurance/bonding capacity (will it meet project requirements?), geographical footprint, skillset/expertise (overlap or synergies?), administrative processes/capabilities (compatible with your systems?), and financial capabilities (can they backstop their indemnity obligations?)
- Evaluate Project Risk
  - ✓ Consider whether the owner has engaged JV's on other projects.
  - ✓ Consider size/complexity of the project.
  - ✓ Are you familiar with the type of work, or is this a new field? Is the work easily separable into each partner's responsibility?
  - ✓ Long term risk exposure - does the JV need to survive after the project? For how long? Will the partner be around to honor the indemnity? Do you need a guarantee?
- Evaluate Corporate Structure / Options
  - ✓ No Separate Entity (JV participants retain corporate structure) vs. Separate Entity (where JV forms separate, special purpose entity for project).
  - ✓ Affiliate entities (where JV participants form separate subsidiaries that enter into the operating agreement)
  - ✓ Consider tax implications
  - ✓ Consider whether local laws/regulations require certain corporate form, or require special licensing.

B. Contract Phase – Operating Agreement Considerations

- General / Business Provisions
  - ✓ Define purpose of JV
  - ✓ Define scope of work and participant obligations
  - ✓ Allocate management responsibilities

→ Establish majority/minority members. Establish who has day-to-day authority. Establish how member votes are allocated, as well when votes are necessary, including what percent approval. Establish onsite authority.

- ✓ Set book/record keeping standards and audit procedures
- ✓ Determine financial processes (joint checks/signing authority)
- ✓ Determine whether and to what extent there will be competition and confidentiality restraints on either participant (limit and define scope)
- ✓ Define which construction costs are to be reimbursed to participants

- ➢ Legal Considerations
  - ✓ Determine legal liability allocation and/or limitations

    → Joint and several unless specified. Other considerations include cross indemnification, sharing risk based on percentage of investment, and limitation on liability.

  - ✓ Evaluate tax considerations/implications
  - ✓ Mitigate fiduciary duties

    → Limit disclosure obligations; Allow participants to sell equipment/services to JV, but create "arm's length" standards; specify scope of shared business opportunities.

  - ✓ Disputes and claims

    → Mediation / arbitration; choice of law and forum (parties from different states – different forums apply unless otherwise specified – consider local law restrictions).

  - ✓ Duration and termination

    → Generally duration limited to specific projects, but can be drafted to last longer for other project opportunities. Define standards for withdrawal. Consider prohibitions on assignment. Establish wind-up procedures (distribution, warranty periods, insurance issues).

  - ✓ Define default and nonperformance and establish consequences (expulsion of defaulting party)
  - ✓ Insurance and Bonding

    → Understand scope of coverage. Some policies include JV coverage, others do not. Project policies may be an option. Consider separate procurement (one provide CCIP, the other SDI). Determine sharing of deductibles, if any, claims management procedures. Determine required Additional insured, Named Insured, Loss Payees.