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“Why Consider A Joint Venture”

If your firm has the soft skills necessary to effectively collaborate with others and an appetite for real but reasonably controllable risk, then you might consider a joint venture.

A joint venture is essentially a partnership that exists for only a particular purpose such as servicing a specific project; and this legal concept can enable an A/E firm to collaborate with others in order to undertake a project for which it lacks the necessary capacity or expertise to service on its own, or to qualify for a government project that requires the participation of a firm with some sort of disadvantaged status.

With the potential advantages, however, a joint venture brings the risk of full and unlimited partnership liability to the venture’s tort and contract claimants, and of expensive disputes between the member firms -- and this dangerously entangling relationship can be inadvertently created by merely the members’ conduct of working together towards a common goal, in which event both members have equal and conflicting rights of control and full legal liability for the costs and other liabilities incurred by the other.

The first step in mitigating joint venture risks is the vetting of both your joint venture partner and potential client. In the end success depends on involving the right people; and while contracts and legal structures can be invaluable when things go wrong, it’s the people who can make things go right.

The second step to mitigating joint venture risks is a carefully negotiated Joint Venture Agreement delineating the members’ rights and responsibilities (and perhaps even creating a formal business entity with corporate “firewall” liability protection), and the crafting of an effective insurance program.

At a minimum a Joint Venture Agreement should address the following basic issues:

- Control. Common examples of control arrangements include a Managing Member with obligations to account to the other, and a Management Committee including members from both firms.
- Contributions. Ideally each firm should clearly understand whatever capital and people it is to contribute, and whatever functions and services it is to provide – both if things go as planned, and if they don’t.

- Profit allocation. The anticipated benefits of the joint venture should be clearly delineated, for example which firm gets what portions of the fees, and how any profit is to be shared. Likewise, how professional accreditation will be claimed should be addressed.
- Risk allocation. As to third parties the joint venture is of course fully responsible; and unless some sort of corporate entity has been effectively created, each member firm is jointly and severally liable for everything. As between the member firms, however, their respective ultimate responsibilities can and should be addressed. For example, each firm might take full responsibility for its own employment law liabilities, while ultimate responsibility for contract and tort liability might be allocated in proportion to fault or to the delineation of service responsibilities, with the arrangements coordinated with an insurance program as discussed below.
- Termination. Against the possibility that a joint venture will not be as successful or as problem-free as hoped, thought should be given as to when and whether the joint venture can be terminated before the completion of the subject project and the related obligations; and in any event how the joint venture will eventually be closed out should be addressed.
- ADR. Realistically joint ventures are fertile ground for disputes; and absent an agreed to alternative dispute resolution plan, a dispute might well lead to a lawsuit that will result in disproportionate cost but no timely resolution.

An alternative to a Joint Venture is a Teaming Agreement, an agreement pursuant to which firms can collaborate in obtaining a project, but which is carefully drafted to avoid joint venture liability, and which contemplates that the subject project will be serviced pursuant to a traditional prime/subconsultant arrangement. Such an approach is particularly well suited to a situation in which one of the members is a large and dominate developer or general contractor, and the other is an essentially subordinate A/E firm.

Regardless of how a joint venture is organized, the insurance scheme is of primary importance and it is critical that you consult with a knowledgeable broker to be sure that contract obligations are met and assets protected.

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