Joint Ventures

A Joint Venture is a combination of two or more partners, joined to carry out a specific business enterprise or project, or a series of such enterprises. The goal is to combine finances, property, skill and knowledge to achieve a successful and profitable outcome.

Forms of Joint Venture

Depending upon the specific purpose of the Joint Venture, the structure can vary, but Joint Ventures generally fall within one of the following broad categories:

1. Named or Open Joint Venture: All partners to the Joint Venture are fully revealed to the Owner. Each partner is jointly and severally liable to the Owner and Surety(s) for the performance and payment obligations of the entire contract. This form of Joint Venture may further be defined as either:

   a. A Percentage Joint Venture, where the partners participate on a fixed percentage of the contract, or

   b. A Line Item Joint Venture, where each partner is solely responsible for performance of specifically designated bid line items. Typically, the partners will subcontract work from the Joint Venture, with each partner bidding its particular specialty, earning profits (or losses) directly associated with their segment of the contract.

2. Silent Joint Venture: One or more of the partners to the Joint Venture are named in the contract and bond, but there are others who are not openly disclosed. Reasons for choosing this method could include the following:

   a. The open or named partner may have inadequate finances, experience or bonding capacity to entertain the project. Seeking to keep the identity of the third party indemnitor or participant secret, a Silent Joint Venture structure may be used.

   b. A key supplier or subcontractor on a given project could initiate a Silent Joint Venture arrangement. This would allow the supplier or subcontractor to support the named partner, without affecting their business relations with other customers.

   Though the Silent Joint Venture partner has duties and obligations to other partners of the Joint Venture per the Joint Venture Agreement, a Silent Venturer has no direct obligation, nor contractual standing, with the Owner.

3. Corporate Joint Venture: The Joint Venture partners combine to form a separate legal entity for the purpose of the business enterprise. Commonly, the formation of a Corporate Joint Venture would be employed only if the Joint Venture was expected to survive beyond a specific project, and exist for a more indefinite period or purpose. In a Corporate Joint Venture, the Corporation alone, is the responsible party to the Owner. The individual construction partners can perform the work under subcontracts to the Joint Venture Corporation.

Advantages of a Joint Venture

A quality Joint Venture is an appropriate method of risk management in the construction business. There are notable advantages of Joint Ventures on construction projects for the individual ventures and also for the Surety(s) involved:

1. Joint Ventures bring a larger asset base to support the obligations of the bonded project, providing for a beneficial spread of risk on the project.

2. Joint Ventures may serve to combine specialized knowledge and abilities of the partners toward a more successful project.

3. Joint Ventures may have an advantage in producing a more accurate and complete bid, combining the necessary comparisons and cross-checks in advance of submitting the estimate.

4. Joint Ventures may facilitate a geographic expansion of one of the partners, by joining with a contractor with local knowledge and cooperative local business arrangements.

5. Joint Ventures may increase a contractor's bonding capacity by allocation of a portion of the open contract liability to other partners and/or their Surety(s).

6. Joint Ventures provide for a pooling of talent, resources, equipment, materials, expertise, manpower and financial resources to encourage a more efficient and predictable final project outcome.

Business Risks with Joint Ventures

One of the inherent risks in Joint Ventures is the overriding desire of each partner to maintain their separation and withhold important proprietary information from the other partners. Also, the joint and several obligation of each partner to the Owner presents a key business risk if one or more of the partners to the Joint Venture is unable to perform. When evaluating the risk associated with a Joint Venture, the following factors should be considered:

1. By its nature, a project performed by a Joint Venture will typically contain a greater degree of financial or business risk than one or more of the partners to the Joint Venture has engaged or performed in the past.

2. Lack of full and complete disclosure of other business issues and contingencies between the partners adds elements of uncertainty between the partners.

3. The governing agreements between the partners, in advance of the bid and in advance of signing final contracts are not standardized. These agreements are specially negotiated by the partners, and one or more of the partners may hold a negotiating advantage over the other(s).

4. The legitimacy or legality of the Joint Venture structure, in bidding or performing work through governmental preference programs, adds a business risk that must be evaluated.

5. This risk not only attaches to the partners but also to the Surety(s) who issue qualifying bonds in favor of the Joint Venture.

6. The long-term nature of many construction projects lends some concern for the overall compatibility of the partners. The relationship will need to endure and remain vibrant through their long association on the project.

Agreements and Documentation

As the construction contract establishes the responsibilities and obligations of the Contractor (Joint Venture) to the Owner, it is also necessary to establish a comprehensive set of agreements between partners of the Joint Venture. These agreements would typically include the following:

1. <u>Pre-bid Joint Venture Agreement</u>: This agreement, prepared and executed in advance of submitting a bid by the Joint Venture, should, at a minimum, provide for the following:

    a. Declares the intent of a Joint Venture between the partners, for the purpose of bidding the project.

    b. Establishes the responsibility of the partners in preparing the estimate of the project, and allocation of the expense of estimating the project.

c. Declares that if the bid is accepted, and a contract awarded, each partner to the Joint Venture shall execute an acceptable Joint Venture Agreement, and enable the Joint Venture to execute the contract in the name of the Joint Venture.

d. Declares that if a bid, performance, and/or payment bond is required on the project, that each partner as Joint Venture will execute the customary documents required by the Surety(s), obligating them jointly and severally liable for indemnification of the Surety(s).

2. Joint Venture Agreement: Upon the award of a contract to the Joint Venture, and prior to the execution of the contracts and bonds associated with the project, the partners should negotiate and execute a formal Joint Venture Agreement which, at a minimum, addresses the following matters of understanding, intent, and agreement:

a. Establishes a formal declaration of the Joint Venture, addressing its intent or purpose, and including a full and legal description of the project(s) for which the Joint Venture has assumed joint and several responsibilities to the Owner.

b. Establishes the "lead" Venturer to the Joint Venture, with respect to securing the bonds and representation to the Surety(s), as well as declaration of joint and several obligations of the Joint Venture and its members to the Surety(s).

c. Establishes the percentage or amount of participation of each partner within the Joint Venture, which determines the share of equity investment, voting control, and distribution of profits or loss allocation among the partners.

d. Establishes the management hierarchy, participation in the management committee, legal designees of each partner, and binding authority of the management of the Joint Venture.

e. Establishes the division of work and performance expectations of each partner.

f. Provides for the contract administration of the Joint Venture with respect to:

i) Establishment and control of the flow of funds and bank accounts

ii) Expectations of ongoing requirements for maintenance or additions to capital or working capital

iii) Maintenance of required insurance

iv) Maintenance of acceptable books and records

v) Provisions for the timing and frequency of distributions of profits, and final distributions to the partners from the Joint Venture

g. Provides for the handling of disputes between the partners, and obligations of the partners to each other, and contemplates the impact of default or bankruptcy of one or more of the partners.

h. The Joint Venture Agreement should be properly executed by all parties to the Joint Venture.