Teaming Arrangements on Infrastructure Projects (The Perfect Pair . . . or the Odd Couple?)*

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I. Introduction

The scale and complexity of construction projects, along with a desire of many project owners to spread available work among multiple contractors, has led an industry trend towards various arrangements among contractors that are referred to as joint ventures, teaming agreements, consortia, partnerships and the like (all of which are collectively referred to as "teaming arrangements" in this paper). Although teaming arrangements are not new to the construction industry, their utilization has accelerated over the years and is now quite common in both the public and private sector. They are regularly used in all types of construction, especially on large infrastructure projects.

This paper is intended to review various forms of teaming arrangements utilized by contractors with each other and with design professionals. It considers some of the principal considerations that motivate contractors to "team up" and some key factors to be addressed in creating a legal framework for the chosen teaming arrangement. Since many teaming arrangements involve majority and minority "partners," consideration has been given to the perspectives of both. For practical guidance, several industry standard documents for teaming arrangements are referenced in this paper.

II. Forms of Teaming Arrangements

A. Teaming/Association Agreements

Under a "Teaming Agreement" or "Association Agreement," a potential prime contractor enters into a written agreement with another firm (an "associated contractor") that agrees to act as a potential subcontractor or consultant for a proposed construction project that has not yet been awarded. Pursuant to this structure,

*This paper is derived from a presentation to the American Bar Association Forum on Construction Law at its 2014 Fall Meeting.

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the lead contractor seeks the expertise or qualifications of one or more associated contractors in order to win and ultimately perform a scope of work that will arise if a prime contract is awarded.[1] Though the parties' relationship tends to be "vertical" in nature (where the lead contractor exercises some degree of management or control over the associated contractor) the Teaming Agreement is not itself a subcontract. Instead, the Teaming Agreement is a good faith agreement that the lead contractor and the associated contractor will work together to pursue a construction contract, with the understanding that they will enter into a subcontract or other joint agreement if the owner awards a prime contract to the bidding entity. Therefore, the scope of work for the parties operating pursuant to this structure is two-pronged: (1) preparation and submission of a bid to obtain a contract for construction; and (2) performing the actual construction and/or design work if the contract is awarded.

A Teaming Agreement will typically detail how the parties will allocate or share responsibilities both in bidding and during performance if a prime contract is secured. Generally speaking, the lead contractor will be the sole bidding entity, serving as a prime contractor and the designated point of contact for the owner. In such an instance, the owner and/or other competitive bidders will look to the lead contractor, and not the associated contractor, with respect to claims or disputes that arise as a result of bidding and/or construction.[2] On the other hand, the associated contractor will remain liable for obligations that arise from its delineated "scope."

Additionally, a Teaming Agreement may specify that only the lead contractor will negotiate with the owner, or it may contain a more collaborative structure whereby the associated contractor takes an active role in owner interaction. It may also provide that each team member shall be responsible for its own costs and expenses incurred in preparing the bid, versus the lead contractor bearing the burden of such expenses.

Teaming Agreements frequently set forth a division of responsibilities relating to the bid, the scope of the associated contractor's work, payment terms, confidentiality of any information exchanged between the parties, a process for adding additional team members, ownership of bid documents, and rights and

[1]There are circumstances where two subcontractors can enter into a teaming agreement as well to win work from a general contractor.

[2]Killian, Fazio, Creating and Enforcing Teaming Agreements, 25-SPG Construction Law. 5, 5–6 (2005). We explain below how in a joint-venture, the members tend to be jointly and severally liable to the owner. In a teaming agreement, the associated contractor remains somewhat insulated from the owner as claims are more naturally asserted against the lead contractor.

obligations that will apply if the owner finds that a team member is not properly qualified to perform under a contract. They may also include exclusivity and non-compete clauses, dispute resolution processes, governing substantive law, and clauses clarifying whether public documents, such as letterheads, signage, and media releases will include the names of both the lead contractor and associated contractor.

If a contract for construction is ultimately awarded to the prime contractor, then the associated contractor's role transitions into something much like a traditional subcontractor and/or consultant. Insofar as subcontract terms are often negotiated after prime contract award, however, and executed at the time the Teaming Agreement is formed. Therefore the Teaming Agreement may also account for how the subcontract will be entered into, and they may recite agreed deal points such as pre-negotiated markups on change orders, material pricing, etc.[3] If the lead contractor fails to win the proposed work, then the Teaming Agreement may terminate, depending upon whether it is limited to a single project rather than a longer-term relationship between the parties.

B. Joint-Venture Agreements

A joint-venture agreement involves many similarities to the previously described Teaming Agreement structure, in that two entities will be working together to win a project award. However, a joint-venture agreement generally represents a more horizontal relationship where the co-venturers share some level of property, management responsibility, profits, and liability.[4] The resulting award of the project that was procured by a joint venture will result in some form of partnership that manages the ensuing construction. A joint venture, which is normally formed for a specific and finite purpose such as bidding and constructing a particular project, is defined more specifically as follows:

> an association of two or more persons formed to carry out a single business enterprise for profit for which purpose they combine their property, money, effects, skill, and knowledge. More specifically, a joint venture is an association of persons with the intent, by way of either express or implied contract, to engage in and carry out a single business venture for joint profit for which purpose such

[3] *See* Newton, The Legal Effect of Government Contractor Teaming Agreements: A Proposal for Determining Liability and Assessing Damages in Event of Breach, 91 Colum. L. Rev. 1990 (1991).

[4] Killian, Fazio, Creating and Enforcing Teaming Agreements, 25-SPG Construction Law. 5, 5–6 (2005).

persons combine their property, money, efforts, skill, and knowledge without creating a partnership or a corporation.[5]

A joint venture is not technically a partnership, insofar as a joint venture is not normally considered a separate legal entity from its members. In most jurisdictions, however, joint ventures are governed by the rules of partnerships.[6] One especially poignant feature of such an arrangement is that co-venturers owe a fiduciary duty of good faith and loyalty as to matters within the scope of the venture. Also, each co-venturer generally has authority to bind its co-venturer(s) to liability to third parties when acting within the scope of the joint venture.[7] Therefore, those entering into a joint venture run a risk that their co-venturer's actions could make them liable to third-parties.

A prudent joint venture agreement should state its scope and seek to define the parties' respective scopes of work and levels of authority. Moreover, such an agreement should specify whether the entities will form a fictitious name for the joint venture. It is also important to address several day-to-day operational functions in a joint venture agreement.

The parties will normally want to lay out the purpose(s) for which their venture was formed, how their joint bid or proposal will be prepared, who will bear certain operating expenses, the allocation of ownership and management control, the required capital contributions, the protocol for distributions and other revenue/profit sharing rights, how insurance and bonds will be obtained, how the contemplated work will be performed, how work may be subcontracted, the duration of the venture, and how the venture will wind up upon termination.

In summary, a joint venture agreement, as compared with a Teaming Agreement, generally allows a minority member more control over the joint decision-making process for bidding and construction. However, the price for such increased control is that the minority venture(s) may incur joint and several liability for the acts of the joint venture and of the other joint venture

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[5] Am. Jur. 2d, Joint Ventures § 1.

[6] In some jurisdictions (*e.g.*, Florida and California), joint venture entities can be licensed separately as contractors. In fact, a joint venture is likely to be treated as a separate entity for licensing purposes and should normally have its own qualifier and license to bid and perform work as a construction contractor. Therefore, while the joint venture is usually not a separate entity, certain liberties are permitted to allow the joint venture entity to transact business. Nonetheless, liability generally flows directly to the individual members of a joint venture, rather than to the joint entity.

[7] Ingrao, Joint Ventures: Their Use in Federal Government Contracting, 20 Pub. Cont. L.J. 399, 401 (1991).

member(s). In other words, the trade-off for increased control and potential profits is an increased liability exposure.

C. Consortium Agreement

A consortium agreement is similar to a joint venture. In a consortium structure, however, the relationship normally involves some sort of loan, guaranty or equity financing. Rather than being composed only of builders and designers, a consortium often includes a plethora of stakeholders such as a contractor, designer, financier, developer, or operator, etc.

The consortium structure is commonly used public-private partnerships, where multiple parties pool resources and expertise to procure and/or perform work together. Each participating entity retains its separate corporate existence, while their mutual agreement sets forth who is responsible for what, and how the members' relationships will be governed. At the same time, a consortium agreement typically does not insulate its members from third parties. Like a joint venture, a consortium structure can expose team members to liability for other members' actions.

D. Partnerships

A partnership is very similar to a joint venture; however the biggest distinction is that a joint venture is normally formed for a specific and limited purpose, whereas a partnership tends to be more general in nature.[8] Additionally, a partnership entity is by definition separate and apart from the partnership's members.[9] Notwithstanding these differences, the liability framework remains virtually identical: a partnership's partners are jointly and severally liable for the partnership's actions. Additionally, and in the context of tax treatment, the partnership will generally not pay taxes itself. Instead, the partnership profits will directly flow to the partners, who will then report this as income on their respective tax returns.

When construing a partnership structure, the parties' agreement should memorialize their respective obligations. Generally speaking, the death or withdrawal of a partner will operate to terminate the partnership. Therefore, the life of a partnership is finite, unless otherwise provided in the agreement. Partnership agreements may also specify how an ownership interest may be

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[8] *See, e.g.,* In re Roxy Roller Rink Joint Venture, 67 B.R. 479, 483, 15 Bankr. Ct. Dec. (CRR) 714 (S.D. N.Y. 1986) ("Moreover, a joint venture is generally treated as a partnership and not a corporation, the only significant difference between a joint venture and a partnership being that joint ventures are organized for a limited time and purpose.").

[9] This distinction puts form over substance. As discussed herein, notwithstanding the existence of a partnership, generally speaking the partners become jointly and severally liability for the partnership's obligations.

transferred, usually subject to approval by other partners. Otherwise, the detailed operational terms of a partnership are left to the partners to negotiate. In these circumstances, the partners have a high degree of control over such issues as financing sources, periodic reporting, and termination of the partnership.

When drafting joint ventures or partnership agreements, U.S. attorneys should be aware of the Uniform Partnership Act ("UPA"), and the Revised Uniform Partnership Act ("RUPA"), which have been adopted by most states and which provide a series of default rules that govern the relations among partners who fail to provide otherwise in a partnership agreement. These default rules are designed to reflect what most partners would assume as implicit in their partnership agreements.[10]

RUPA addresses many issues that are likely to be needed in any teaming arrangement. To the extent a partnership agreement in the construction context fails to define the partnership, partnership property, the transfer of partnership property, fiduciary duties, and dissolution, etc., the RUPA provides guidance as to these issues. It should be noted that some of these obligations may not be waived even through a partnership agreement. For example, RUPA provides that partners owe an absolute duty of loyalty and duty of care to the partnership and the other partners.[11]

There are other forms of partnership that purport to limit the liabilities of individual partners. For example, in a limited liability partnership, a partner will generally not be liable to third parties for the partnership's obligations. However, some states require a limited liability partnership to maintain insurance in order to secure such obligations.

In a limited partnership, individual limited partners are not generally liable for the obligations of the limited partnership, and they generally do not owe fiduciary duties to the limited partnership or to other partners.[12] Therefore, the limited partner in such an arrangement enjoys a certain degree of insulation from liability. On the other hand, a general partner in a limited liability partnership is normally liable for the partnership's obligations, and the partnership is probably liable to third parties for

[10]Elizabeth O' Connor Tomlinson, Construction and Application of Revised Uniform Partnership Act, 70 A.L.R.6th 209.

[11]Rev. Uniform Partnership Act Section 103 (2013 to 2014 ed.)

[12]A limited partner may be liable if (1) the limited partner is also a general partner; and (2) to third parties who, as a result of a limited partner's participation in control of the business, reasonably believe that the limited partner is a general partner. *See* Keatinge and Conaway on Choice of Business Entity § 4:5.

the general partner's conduct. These arrangements are governed by the RULA in most states.

In summary, a partnership is most commonly formed when two entities want a longer term relationship, whereas their cooperation on a single project is more often handled by a joint venture. Overall, partnerships offer a flexible form of doing business, but they expose their partners to broader third party liability than what normally arises under a limited partnership or a joint venture agreement.

E. Corporate Entities (Corporations and LLCs)

A corporate entity such as a traditional corporation or a limited liability company (LLC) can be used when members want to share control and profits but are unwilling to assume joint and several liability to third parties, as would accrue under a joint-venture or traditional partnership structure. Corporate forms are widely used to insulate parties from liability that may otherwise accrue at common law. The legal entity is separate from its shareholders or members, and liability to third parties is normally limited to the entity. The corporate entity on a construction project is also generally a separate tax-paying entity, subject to applicable regulations.

One distinction between a corporation and a partnership is the fact that stock certificates are the basis of ownership in a corporation. The stockholder thus possesses a relatively fungible asset, which may be transferred to third parties with relative ease, unless restricted by a shareholders agreement. In other words, the corporate existence continues although its stockholders may change, whereas in a partnership, a change in principal status will often trigger a termination of the entity.

Another distinguishing feature of a corporation is the need for corporate entities to file certain registration papers and pay fees, which include formation fees, filing fees, and annual fees, in the governing jurisdiction. Thus the formation of a corporate entity tends to require more startup and administrative costs than a joint venture or partnership, which may be launched and maintained simply by executing an agreement. Additionally, a corporation must adhere to certain corporate formalities, such as holding annual shareholder meetings, recording corporate minutes, having board of director approval for major corporate actions, and providing for shareholder voting. Therefore, the management of a corporation is often more time consuming than the relatively informal partnership structure. If such formalities are not adhered to, a shareholder may incur liability for corporate

actions through a theory of alter ego or piercing the corporate veil.[13]

With these features in mind, corporations only come into existence by filing articles of incorporation and a certificate of incorporation. The articles of incorporation will establish (1) the name of the corporation; (2) the name and address of a registered agent; (3) the nature or purpose of the business to be conducted; (4) the numbers of shares of stock authorized in each class of stock; (5) the name and address of each incorporator; and (6) if the powers of the incorporators will terminate upon filing of the certificate of incorporation, the name and mailing address of the persons to serve as directors until the first annual meeting of stockholders. Additionally, a certificate of incorporation may include provisions relating to: (1) regulating corporate powers; (2) compromising of claims; (3) granting preemptive rights to stockholders; (4) requiring supermajority voting for corporate action by stockholders or by a larger number of directors; (5) limiting the duration of the corporation's existence to a specific date; (6) imposing personal liability for corporate debts upon the stockholders; and (7) eliminating or limiting the personal liability of a director of the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director.[14] Finally, and after a corporate entity comes into existence, it will adopt bylaws to address the day-to-day functioning of the corporation, including directors', officers' and shareholders' rights and duties, management, etc.

Therefore a corporate entity requires more formalities than a partnership or a joint-venture. The insulation from liability is an advantage of this structure for shareholders, but the separate treatment of a corporate entity (if formed for a single purpose) could also work against bidders if that entity lacks sufficient resources and/or experience to qualify for the contemplated work.

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[13]Generally speaking, for a court to pierce the corporate veil, "two separate, essential factors must be established." Dickens v. Alliance Analytical Laboratories, LLC, 127 Wash. App. 433, 440, 111 P.3d 889 (Div. 3 2005). " 'First, the corporate form must be intentionally used to violate or evade a duty' " (quoting Meisel v. M & N Modern Hydraulic Press Co., 97 Wash. 2d 403, 645 P.2d 689 (1982)). "Second, the fact finder must establish that disregarding the corporate veil is necessary and required to prevent an unjustified loss to the injured party." *Dickens,* 127 Wn. App. at 441. Furthermore, a court may pierce the corporate veil under an "alter ego" theory "when 'the corporate entity has been disregarded by the principals themselves so that there is such a unity of ownership and interest that the separateness of the corporation has ceased to exist.' " Grayson v. Nordic Const. Co., Inc., 92 Wash. 2d 548, 553, 599 P.2d 1271 (1979) (quoting Burns v. Norwesco Marine, Inc., 13 Wash. App. 414, 535 P.2d 860 (Div. 2 1975)).

[14]Keatinge and Conaway on Choice of Business Entity § 3:16.

F. Design-Build Arrangements

A design-build arrangement is one where a design professional, such as an architect or an engineer, teams with a contractor in order to streamline the design and construction processes and provide a comprehensive solution for an owner that traditionally would be required to hire separately a designer and a builder. This arrangement tends to overlap the design phase and construction phase of a project and can take any of the organizational forms described above (joint-venture, partnership, corporation, etc.). The parties entering into such a structure hope to fast track construction by early contractor involvement in estimating and material procurement, as well as a collaborative approach to interpreting specifications.[15]

A design-build arrangement can be structured vertically, where there is a "prime" member, and the associated entity derives some level of compensation for services rendered. For example, a design-build team may be comprised of a design professional as the prime member with a contractor providing construction services as a "subcontractor" or conversely, it may be comprised of a contractor as the prime member with architects and engineers providing design services as "subcontractors." Alternatively, a design-build arrangement may be horizontal in nature where the design and construction entities partner and share in the overall successes and failures of the project. No matter how the agreement is structured, a design-build operating agreement usually provides for a team leader, who will provide overall direction and leadership, and will be the conduit for communication with the owner.

One important feature of this arrangement is harmonizing the design phase with the construction phase. For example, tension can arise between the design-build team members if a design delay is causing a lag in the construction schedule. To address this concern, a design-build arrangement can be structured so that the designer has a separate contract with the joint venture, and the designer's profits and losses pursuant to that agreement will have no bearing on its right to profits and losses on the main joint venture agreement governing construction.[16] However, in a purely "horizontal" structure, the delay in design would have to be borne equally by all of the team members.

Therefore, and aside from addressing how the design professional and contractor will each function, a design-build agreement typically contains many other day-to-day deal points that have been previously described in this article.

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[15] Bruner & O'Connor Construction Law § 2:12.

[16] *See* ConsensusDocs Form 499, Joint Venture Agreement.

III. Why Team Up? Issues and Considerations that Drive the Decision Making Process

As in other business decisions, a variety of objective and subjective considerations will factor into the decision to utilize a joint venture or some other Teaming Agreement to pursue a particular project. The decision making process is very likely the same, regardless of whether the decision is being made by a contractor, an architectural or engineering firm, or a subcontractor.

A. The Nature of the Project Might Necessitate a Teaming Arrangement

The demands of project itself may be the first consideration. Many large, complex projects effectively require more than one contractor to be involved simply because of the magnitude of the scope of work. There probably is no better example than the Hoover Dam. The winning bid in 1931 was $48,890,955, and none of the firms pursuing the project had the resources to go it alone. In today's dollars, the Hoover Dam would be a multi-billion dollar project. The winning bid was submitted by a joint venture of Utah Construction Co., Morrison-Knudsen, Pacific Bridge Co., Bechtel, MacDonald & Kahn and J.F. Shea Co. The Joint Venture was called "Six Companies."

These days, contractors are still teaming up to pursue large infrastructure projects such as the LAX Bradley Terminal Project, recently completed by a joint venture of Austin Commercial L.P. and the Walsh Group.

If a project requires an unusual or unique scope of work, it may give a competitive advantage to particular contractors or designers who have special expertise, but those firms may lack the capacity or resources needed for the size of the project. In such cases, teaming with an experienced general contractor or construction manager or engineer can provide business opportunities not otherwise available to the specialized contractor or subcontractor if acting alone.

B. A Teaming Arrangement Can Be Utilized to Manage Financial Risks Inherent in Large Projects

Risk management and risk mitigation are also important considerations in determining whether to pursue a teaming agreement. Contractors may simply be looking to manage risk by sharing the potential financial exposure on a large or complex project. As discussed below, allocation of risk among the partners is a crucial element in crafting effective teaming agreements.

The size of the project may bring a surety into the decision making process. The bonding capacity of a single contractor may be insufficient to pursue the project, and the contractor's surety might suggest teaming with another contractor. When consider-

ing the issuance of performance and payment bonds on a large, complex project, sureties may want to spread the risk among two or more parties regardless of the bonding capacity of any individual participant in the pursuit.

Cities, counties and metropolitan airport authorities are among the project owners on large public works projects that may require more than one contractor to be involved. Contractors often find that these owners require joint ventures as a means of providing security for completing a large project, just as similar considerations have traditionally led to requiring surety bonds. Conversely, some owners may prohibit the use of joint ventures when awarding a project.

C. Location! Location! Location!

One of the most common considerations driving the decision to form a team is geography. The project could be located in a region where Contractor A has no presence. However, the scope of the project may fit Contractor A's resume very well. Contractor B has been in the geographical location for many years and knows the market, the project owner and the local subcontractors very well, but Contractor B may lack experience in building this particular kind of project. A joint venture of these two contractors could therefore make a lot of sense. The downside to Contractor B is that it may be giving Contractor A entry into the local market and creating new competition. Contractors routinely use this method to expand into new geographical markets.

D. Teaming Arrangements Allow for the Pairing of Contractors with Complementary Skills and/or Finances

A project might benefit from the specialized technical expertise of a contractor that lacks the capacity, financial assets or bonding capacity that would be needed to pursue the project alone. A joint venture or other teaming arrangement may give this contractor an ability to pursue work it otherwise could not pursue.

Similarly, the project might require a special license or other credential that one contractor has but another contractor does not. Local laws may also require a separate contractor's license for the joint venture in addition to the licenses that the individual participants may already have.

E. Teaming Arrangements Enable Contractors to Meet Set Aside Requirements

Minority owned, women owned or disadvantaged business requirements of a project may also drive the decision. It is common for public projects to have MBE, DBE or WBE requirements for participation at the subcontract level. Public sector owners often require such participation at the construction manager/

general contractor level, favoring a joint arrangement in which the minority contractor becomes a partner in the joint venture.

F. Design/Build Projects

Design/Build or Engineer-Procure-Construct projects may favor formation of a team that includes a contractor or construction manager and an engineer or architect. This delivery system is becoming more common on large, civil projects such as bridges and highways. These arrangements require special consideration of the design liability. Architects and engineers generally have comparatively low policy limits on professional liability insurance, so joint venture partners will need to consider how to mitigate risk of errors and omissions by the engineer-design partner. The joint venture will have joint and several liability to the owner, but its partners will generally negotiate some kind of apportionment of risk among themselves. A separate professional consulting agreement or subcontract between the joint venture and the engineer-design partner is one way of creating an "arm's length" relationship that can shift design responsibility. Project-specific professional liability insurance coverage naming the joint venture and all partners as insureds is another way to manage this risk.

IV. Essential Steps to Put Together a Successful Team

A. Finding a Suitable Teammate is the First Step in the Teaming Process

Once a decision is made to pursue a project through a teaming arrangement, the next step is finding the right entity (or entities) to form the team. Depending on the complexity and size of the project (both in scope of work and financial outlay), the due diligence process will vary. However, the following questions should be fundamental parts of such due diligence.

1. Who Is the Target Team Member?

This inquiry should include, without limitation, analyzing the proposed member's legal structure, authorized representative(s), qualifications to do business, licenses, and technical expertise. Of course, these criteria must be examined in the context of the project owner's stated requirements for bidder responsibility under the advertised contract (the "Target Contract") and the proposed member's, if any, with that owner.

2. What Is the Financial and Bonding Strength of the Proposed Team Member?

To answer this question, it will generally be prudent to obtain financial statements from the proposed team member, and perhaps also to run a credit report. The goal is to determine whether the potential member can bear its share of in the

financial support of the team arrangement. The financial strength of a team member also bears on the joint entity's potential need to request guaranties from individual owners of the proposed member.

3. What Is the Potential Team Member's Past Work Performance, and What Has Been Its Relationship with Past Customers?

In assessing this aspect, it can be useful to ask a potential team member about other projects in which it has been involved in a teaming arrangement, and the outcome of those projects (in order to ascertain whether the proposed team member has liabilities that may affect its performance on the Target Contract). It is also prudent to inquire whether the proposed team member has been terminated on any other projects (at least during the past five years) and general questions related to its relationship with customers.

4. What Is the Litigation or Claim History of the Proposed Team Member?

Inquiries should be made as to whether the proposed team member is currently involved in litigation or has been involved in litigation or claims in the recent past. Inquiries should also be made as to whether the potential team member is party to any current litigation or investigation.

5. What Is the Prospective Team Member's Safety Rating?

It is important to determine the prospective team member's safety rating, as a number of public and private contracts have a minimum industrial insurance rating requirement for contractors. Some public entities will also request the insurance experience modification ratings as another measure of a participant's safety practices.

6. Is the Prospective Member Truly Compatible with the First Party?

A financially flush proposed member or entity, with a particular skill set that will give the team either a leg up on competitors or satisfy underlying requirements for the Target Contract, can be seductively appealing. However, it is important to evaluate whether the members will be compatible and be able to work together. It follows that corporate culture and previous experience with a particular potential member should be examined.

7. Does the Prospective Member Have a Qualification or Certification that the First Member Lacks But Is Necessary to Secure the Target Contract?

Additionally, the nature of the Target Contract may require

consideration of special attributes of a potential team member. For example, an owner may require participation by a Disadvantaged Business Enterprise/Women Business Enterprise/Minority Business Enterprise (collectively referred to as "DBE"). Both the federal government and a number of states have set asides for public works projects that call on contractors to provide a certain percentage of DBE participants. Because the federal government permits such preferences, even states, such as Washington, that have statutes prohibiting preferential treatment in public contracting, have exceptions for federally funded projects.[17] Additionally, a growing number of companies in the private sector, such as Microsoft, permit preferences or require DBE certifications. Where DBE participation is encouraged or required, a contractor should verify the certification status of a potential team member.

B. Potential Team Members Must Take Affirmative Steps to Protect Their Interests During Initial Discussions and Performance of the Construction Contract.

1. Protection of Proprietary Information Disclosed During Negotiations Leading to a Teaming Arrangement and the Performance of the Ultimate Contract

Inevitably, financial information will be disclosed during the due diligence investigation of potential team members and the preparation of a bid. The parties will often disclose other types of confidential and proprietary information, both before and after award of the Target Contract. To facilitate the free flow of information and foster team building, it is essential to impose an affirmative obligation to treat and hold non-public information as confidential. A properly drafted Confidentiality Agreement should assure that neither party will improperly use the other party's proprietary information. Because preliminary discussions for a Teaming Agreement may not result in the consummation of an actual agreement, it is imperative that a Confidentiality Agreement be entered into before substantive disclosures begin.

A Confidentiality Agreement should of course define the documents and/or information that will be considered "confidential," how they will be handled, and the consequences of a failure to follow the agreement. The parties should also discuss whether either party will be precluded from submitting a bid to an owner on its own or with a different partner under any circumstances.

[17] *See* RCW 49.60.400(6).

2. Preliminary Agreements May Be Enforced Against a Party Who Determines It Does not Want to Proceed with a Teaming Arrangement.

While the parties may believe they have exhausted the due diligence process and are comfortable formalizing a teaming arrangement, a party may decide that it no longer wants to pursue the joint teaming arrangement. Such a decision can occur at any time during the negotiation process and before a written Teaming Agreement has been finalized. At that point, one important question is whether the parties have already reached a legally binding agreement. In analyzing whether the parties intended to be bound even before executing a written contract, courts will examine the magnitude and complexity of the proposed arrangement. If there are numerous written drafts, or if it is clear that major deal points had not yet been resolved when one party gave notice of its decision to drop out of the transaction, the parties probably did not intend to be bound unless and until the partied executed a formal written agreement.[18] Where parties to a negotiation evidence intent not to be bound until they have signed a formal agreement, a court is unlikely to hold that they were mutually bound at an earlier date.[19] Indeed, there is a strong presumption against finding a binding agreement when the parties expressly contemplated the future preparation and execution of a formal written contract.[20] This presumption can prevail even when the parties had orally agreed upon all material terms of the proposed contract.[21]

However, where there are no essential terms missing from an

[18] *See* Reprosystem, B.V. v. SCM Corp., 727 F.2d 257, 262–263, Fed. Sec. L. Rep. (CCH) P 99667 (2d Cir. 1984) ("The magnitude and complexity of the deal as reflected in the numerous written contract drafts not only reinforced the parties' stated intent not to be bound until written contracts were signed, but also reflect a practical business need to record all the parties' commitments in definitive documents."); Kona Hawaiian Associates v. Pacific Group, 680 F. Supp. 1438, 1454 (D. Haw. 1988) (Business entities ordinarily do not enter into multimillion dollar transactions in the absence of a comprehensive writing.).

[19] *See* V'Soske v. Barwick, 404 F.2d 495, 499 (2d Cir. 1968) (where parties to a negotiation "intend not to be bound until they have executed a formal document embodying their agreement, they will not be bound until then"). *See also* Building Service Employees Intern. Union, Lodge No. 6 v. Seattle Hosp. Council, 18 Wash. 2d 186, 194, 138 P.2d 891 (1943) ("Where it is clearly understood that the terms of a proposed contract, though tentatively agreed upon, are to be reduced to writing and signed before it is complete and binding on the parties, there is no final contract until that is done.").

[20] Teachers Ins. and Annuity Ass'n of America v. Tribune Co., 670 F. Supp. 491, 499 (S.D. N.Y. 1987).

[21] Chromalloy American Corp. v. Universal Housing Systems of America, Inc., 495 F. Supp. 544, 550 (S.D. N.Y. 1980), aff'd, 697 F.2d 289 (2d Cir. 1982)

oral teaming agreement and there is no evidence the parties intended to be bound only if a written agreement was executed, a court may find that an enforceable teaming arrangement existed. *Cable & Computer Technology, Inc. v. Lockheed Sanders, Inc.*[22] is a significant decision illustrating the dangers of one party pulling out of an oral Teaming Agreement after the parties had reached the essential, albeit not yet formalized in writing, terms of an agreement. In *Cable*, the Ninth Circuit Court of Appeals upheld the enforcement of an oral Teaming Agreement to pursue a subcontract with the Boeing Company. In that case, Cable and Lockheed Sanders had not yet reached final accord on the financial terms of the Teaming Agreement when Lockheed Sanders withdrew from the team two weeks before the project bid date. Cable could not bid the project on its own and sued for enforcement of the Teaming Agreement. Lockheed Sanders prevailed on summary judgment as to the dismissal of the breach of contract claim. The Ninth Circuit reversed the trial court's summary judgment dismissing the breach of contract claim, noting in its decision to publish the opinion:

> In some respects a garden variety contracts dispute, this case is set particularly in the world of defense contracting and draws a clear distinction between mere agreements to agree and agreements to team together to bid a subcontract, so that we think it may be helpful to publish our opinion.

Cable & Computer Technology, Inc., 214 F.3d at 1033. The court went on to state:

> No naked agreement to agree constitutes a contract. If Cable can prove no more than that to a jury, Sanders must prevail. But what Cable offered in evidence to the district court was an exchange of promises, supported by consideration, to be a team with Sanders and as a team submit a bid to Boeing. If believed, that evidence established an oral contract. Unlike an agreement to agree, an agreement to use best efforts to achieve a common objective is a closed, discrete, and actionable proposition.

Cable & Computer Technology, Inc., 214 F.3d at 1035 (citations omitted). The case was remanded to the trial court, and the jury awarded not only compensatory damages but punitive damages to Cable.

One lesson to be learned from *Cable* and its successor cases is that if parties do not intend to be bound to a teaming arrange-

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("If parties 'contemplate a reduction to writing of their agreement before it can be considered complete, there is no contract until the writing is signed.' This rule obtains even if the parties have orally agreed upon all the terms of the proposed contract.").

[22]Cable & Computer Technology Inc. v. Lockheed Sanders, Inc., 214 F.3d 1030, 2000-2 Trade Cas. (CCH) ¶ 72991 (9th Cir. 2000).

ment until they sign a written agreement, they should protect themselves at the outset so that discussions regarding deal points for a teaming arrangement do not become a binding contract. A letter of intent is one form of preliminary agreement that can protect the preliminary negotiations. Specifically, a letter of intent can recite that the proposed terms of agreement are preliminary and non-binding, that a Teaming Agreement is not effective until it is mutually signed, and that any oral statements or representations to the contrary are not binding.

V. Drafting a Successful Teaming Agreement

It is of course important to exercise care in drafting a definitive document, whether it is a joint venture agreement, partnership agreement, limited liability company operating agreement or other form of contract between general contractor and subcontractor. While the type of entity chosen to be the format for the team may vary, certain essential elements of any teaming arrangement are likely to include the following:

A. Identification of Project for Which the Teaming Arrangement Is Organized

In an introductory section, a Teaming Agreement, it should identify the parties and their relationship (e.g., joint venture vs. contractor/subcontractor arrangement) and the purpose of the teaming arrangement (typically identifying the Target Contract).

B. Interests of Team Members

The percentage interest of each Team Member in the profits, assets, capital contributions, contributions of personnel and other resources, surety support, losses, liabilities and voting control should either be set forth in the body of the agreement or in an exhibit. It is also good practice to include mutual indemnification provisions that protect members if they incur a loss or liability which exceeds their percentage interest share of the loss or if the other Team Member engages in some wrongful action.

C. Scope of Work/Division of Responsibilities/Management of Team Arrangement

The scope of work performed by each party should be set forth in detail, not only in preparing the Target Contract bid, but also in completing the contract work itself if a contract is awarded. With regard to the scope of work, it is also important to delineate a decision-making process to guide each stage of the project. That process should include preparation and submittal of a bid, negotiation of the Target Contract, performance of the underlying contract work, and possible activities after completion of construction (such as defending or prosecuting potential claims).

D. Delineation of Financial Obligations and Benefits

In addition to allocating scope of work, a Teaming Agreement

should clarify each party's financial responsibility for costs associated with the underlying project. Generally, a distinction is made between costs incurred before bid submission and costs incurred after a potential award of the Target Contract. With regard to the former, each party generally bears its own costs. As to costs of performing the Target Contract, however, the team typically bears the costs.[23] Equally important is setting forth how each party will be paid, when it will be paid, and what costs will be reimbursed before any profits are distributed. The agreement should also provide a remedy if one party fails to timely pay its financial obligations on the project. Finally, the parties must determine how financial loss on the Target Contract will be allocated and what provisions can be added to protect a party that may have paid more than its allocated share of a loss.

E. Events of Default and Remedies

A prudent Teaming Agreement should set forth what events constitute a default. Typically, events of default include not only a breach of the terms of the agreement, but a Team Member's filing for bankruptcy, liquidation or making a material misrepresentation of its financial position. The Teaming Agreement should set forth the consequences of a default (e.g., upon the occurrence of the default, the defaulting Team Member may lose its right to vote) and the remedies available to the remaining Team Members (e.g., a right to dissolve the teaming arrangement).

F. Termination Provision

The Teaming Agreement should clarify the circumstances in which a party may terminate the agreement, and the consequences of such a termination. In particular, a provision should address what will occur if one party files bankruptcy.

G. Protection of Confidential/Proprietary Information and/or Intellectual Property

Regardless of whether the parties executed a separate Confidentiality Agreement, the Teaming Agreement itself should address the exchange and handling of confidential/proprietary party information, such as financial information. The agreement should identify who will own any intellectual property resulting from, or arising out of, the Teaming Agreement and what will happen to any confidential information when the project is completed or terminated.

H. Choice of Law/Venue Provisions

The Teaming Agreement should provide for choice of law and

[23]One exception is a line item joint venture, under which each party to a joint arrangement undertakes separate responsibility for costs incurred in performing specified parts of the design and/or construction work.

venue for any action arising out of, or related to, the Teaming Agreement. The choice of law provision should tie into any alternative dispute resolution procedure that the parties have adopted.

I. Alternative Dispute Resolution Procedures

The parties should consider whether to require mitigation, mediation and/or arbitration in the event of any dispute arising out of, or relating to, the Teaming Agreement. Typically, a Teaming Agreement provides a tiered approach to resolving disputes. A typical first step calls on the parties to engage in direct discussions and, if a resolution cannot be achieved within a certain number of days, the Team Members may bring in senior executives to attempt a resolution. If that process also fails to resolve the dispute after a specified period of time, Teaming Agreements often require each party to participate in a mitigation process, after which any remaining issue is referred to mediation and/or a binding adjudication process like arbitration.

Typically, a dispute mitigation process refers an issue to a Project Neutral or Dispute Review Board, through mutual selection by the parties. Generally, the parties would share the cost of the Project Neutral or Dispute Review Board and would outline the relevant decision-making process. Contract provisions also typically provide that the recommendations/decisions of a Project Neutral's or Dispute Review Board are nonbinding, and they will clarify whether such input may be used as evidence in a subsequent binding adjudication of the matter. If the nonbinding mitigation process fails to achieve a resolution, Teaming Agreements can then require the Team Members to proceed either with mediation or a binding adjudication process.

When mediation is enabled, it should generally be convened within a set period of time after one of the parties asks for it. Teaming Agreements generally provide that the costs of mediation are shared equally by the Team Members.

Anticipating that the matter may not be resolved at mediation, Teaming Agreements often provide that any party may submit the matter to binding arbitration or to litigation in a designated forum venue. As to the former option, it is important to provide both for arbitrator selection and for the parameters of the arbitration. The agreement will also frequently address whether the parties will engage in discovery and, if so, the extent of permissible discovery, because discovery is one of the greatest drivers of cost and delay in dispute resolution. The arbitration provision should: (1) specify what rules will apply to the arbitration (for example, local court rules, AAA Construction Arbitration rules, or JAMS rules); (2) whether the number of witnesses will be limited in arbitration; and (3) whether dispositive motions will be allowed and the length of the time of the arbitration.

A carefully worded dispute resolution provision can significantly reduce dispute expenses and shorten the period of time for the resolution of problem.

J. Limitations of Liabilities

The parties may elect to limit their liability to each other in various ways. It is common to include waivers of consequential and punitive damages, and a variety of other damages can be capped or liquidated. Parties may also agree to indemnify each other in connection with certain categories of third party claims arising from their acts or omissions. To the extent a party provides such an indemnification, it should consult with its insurance broker to see whether it can obtain insurance coverage for a contractual indemnification (generally it cannot).

K. Miscellaneous Provisions

Generally, the "miscellaneous" section of a Teaming Agreement will be a "catch all" for boiler plate contract provisions, such as the severability of unenforceable provisions in the agreement, as well as the following:

- Joint Defense/Prosecution Agreement. While everyone hopes that a project will go smoothly, there are many things that can go wrong. If the Team becomes involved in disputes with the Owner or another third party, the Team will want to present a united front. More importantly, the Team members will want the ability to discuss such issues freely among themselves and their attorneys without fear of waiving attorney-client privileges. A Teaming Agreement can set the groundwork for preserving such privilege. It may also facilitate cooperation by incorporating language such as, "the Parties covenant to work together in a relationship of trust, good faith and fair dealing and will take all actions reasonably necessary so that the Work can be secured and performed in an economical and timely manner consistent with good workmanship and sound business practices." Alternatively, the Agreement may include language to the effect "that in the event of the prosecution of or defense of a claim related to the Owner, the Parties will execute a Joint Prosecution/Defense Agreement, as applicable, and will work together in a relationship of trust, good faith and fair dealing to prosecute/defend the claim";
- Prohibition against assignment of the interests and rights of a Team Member without the consent of the other Team Members;
- Reasonable disclosure of each party's financial information throughout the term of the teaming arrangement upon the request of the other Team Member;

- A limitation of rights of any creditor or other third parties solely to the right to claim or receive a Team Member's distributive share of profits after completion or termination of the project; and
- Non-solicitation of employees of another Team Member for a certain period of time following the completion of the Target Contract.

L. The Teaming Agreement Should Address Situations Unique to the Team Members

In addition to the kinds of boilerplate contract items above identified, the attorney drafting and/or reviewing a proposed Teaming Agreement should consider the unique circumstances of the Team Members. One such circumstance may be the project owner's requirements for DBE participation. For example, if the owner requires removal of a decertified participant, is there a provision in the Teaming Agreement document to address the situation? If the Teaming Agreement allows a Team Member to be terminated due to such decertification, that party might want a provision clarifying that such termination would be treated a termination for convenience and not for "cause." The terminating (non-certified) party, on the other hand, would probably want such termination to be for "cause."

Another special circumstance may arise if only some (but not all) owners/members/shareholders of the Team Members are required to execute personal guaranties for the project (the "Project Guarantors"). In such an event, the Project Guarantors would probably want an assurance that the non-signing owners would indemnify their proportionate share of any sum that ends up being paid on the personal guaranties. *See* sample forms of Teaming Agreements from ConsensusDocs (Forms 296 (Teaming Agreement), 297 (Joint Venture Line Item Agreement Between Constructors For a Project), 298 (Joint Venture Agreement Between Constructors For a Project), 299 (Joint Venture LLC Operating Agreement Between Constructors For a Project), 498 (Teaming Agreement for a Design-Build Project) and 499 (Joint Venture Agreement for a Design-Build Project)).

VI. Conclusion

Teaming arrangements are generally intended to combine the strengths of each party to help obtain and perform a construction project. Whether the parties enter such an arrangement as coequals or with one party subcontracting to the other, the goal of getting the work and performing it more efficiently remains the same. When two or more parties team together, each of them must consider the risks—whether financial, structural, or psychological—of being bound to each other in ways that could

cost both parties if there is a falling out. This is why there is no one single best type or structure of teaming arrangement. Ultimately, the parties need to figure out the best way to stand together, so as to keep everything from falling apart.

DRAFTING A SUCCESSFUL TEAMING AGREEMENT—CHECKLIST

Teaming arrangements can be memorialized in various forms of definitive document, whether it is a joint venture agreement, partnership agreement, limited liability company operating agreement or contract between general contractor and subcontractor. While the type of entity chosen or the form of agreement may vary, the following essential terms are likely to be included:

1. *Identification of Project for Which the Teaming Arrangement Is Organized.*
   - Who are the parties to the arrangement?
   - What is the target Project?
   - What form of teaming arrangement (e.g., joint venture, limited liability company) will be used?
2. *Interests of Team Members.*
   - What percentage interest will each Team Member have in the profits, assets, capital contributions, contribution of personnel and other resources, surety support, losses, liabilities and voting control?
   - Consider whether to have mutual indemnification provisions that protect members if they incur a loss or liability which exceeds their percentage interest share of the loss or if a Team Member engages in a wrongful action.
3. *Scope of Work/Division of Responsibilities/Management of Team Arrangement.*
   - Identify in detail the scope of work performed by each party.
   - Delineate the decision-making process for each stage of the project: that is from preparation and submittal of a bid, negotiation of the Target Contract, to performance of the underlying contract work, to any activities after completion of the Target Contract (such as defending or prosecuting claims or litigation against the owner).
4. *Delineation of Financial Obligations and Benefits.*
   - Identify the financial responsibility of the parties in connection with formation of the Teaming Agreement.
   - Identity the financial responsibility of the parties for the costs associated with performance of the Target Contract.

- Set forth a remedy if one party fails to timely pay its financial obligations related to the Target Contract.
- Set forth how financial loss related to and/or arising out of the pursuit or performance of the Target Contract will be allocated.
- Set forth provisions to protect a party that pays more than its allocated share of a loss.

5. *Events of Default and Remedies.*
   - What events constitute a default (e.g., breach of the agreement/filing for bankruptcy by a team member)?
   - What are the consequences of the default? (e.g., upon the occurrence of the default, the defaulting Team Member loses its right to vote)
   - What remedies are available to the remaining Team members in the event of a default? (e.g., in the event of a default, may the remaining members elect to dissolve the Teaming Arrangement?)
6. *Termination Provision.*
   - Identify the circumstances pursuant to which a party may terminate the agreement, and the consequences of a particular type of termination
7. *Protection of Confidential / Proprietary Information and / or Intellectual Property.*
   - Address the exchange and handling of intellectual property and confidential/proprietary party information, such as financial information.
   - Identify who will own any intellectual property resulting from, or arising out of, the Teaming Agreement.
   - Identify what will happen upon termination of the agreement to any confidential and/or proprietary information exchanged between the parties.
8. *Choice of Law / Venue Provisions.*
9. *Alternative Dispute Resolution Procedures.*
   - Consider whether to require mitigation, mediation and/or arbitration in the event of any dispute arising out of, or relating to, the Teaming Agreement.
     - "Executive Resolution Process": Senior level executives attempt to resolve the issue.
     - "Dispute Mitigation": Should the Executive Resolution Process fail, the parties may refer the matter to a Project Neutral or Dispute Review/ Resolution Board.
     - "Mediation": If the matter remains unresolved following the issuance of nonbinding findings by the PN/DRB, or the PN/DRB cannot issue non-

binding findings, the agreement may provide the parties proceed to mediation.

- ○ Litigation v. Arbitration: If the agreement provides the parties shall arbitrate, the agreement should provide for arbitrator selection and the parameters of the arbitration (e.g., to what extent discovery will be allowed, what rules will apply to the arbitration, whether the number of witnesses will be limited, whether dispositive motions will be allowed and the length of the time of the arbitration).

10. *Limitations of Liabilities.*
    - Consider whether there should waivers of consequential damages, punitive damages or liquidated damages.
    - Consider whether to include an indemnification provision in favor of the other party or relating to, or arising out of, or connected to the first party's involvement in the Teaming Agreement.
11. *Miscellaneous Provisions*.
    - Include a Joint Defense/Prosecution Agreement in the event issues arise with the Owner of the Project. Alternatively, the agreement may contain language such as, "the Parties covenant to work together in a relationship of trust, good faith and fair dealing and will take all actions reasonably necessary so that the Work can be secured and performed in an economical and timely manner consistent with good workmanship and sound business practices."
    - Include a clause prohibiting the assignment of the interests and rights of a Team Member without the consent of the other Team Members.
    - Include a clause that limits the rights of any creditor or other third parties solely to the right to claim or receive a Team Member's distributive share of profits after completion or termination of the project.
    - Include a clause that prohibits a team member from soliciting employees of another Team Member for a certain period of time following the completion of the target contract.