PUBLICATION

Game Winning Strategies to Ensure Your JV Performs at the Varsity Level

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Although the air may not be cool and crisp yet, it is August, and in the South, that means football season is just around the corner. Perhaps it is "football brain" that drove our thoughts in presenting recommendations for creating and running a successful joint venture ("JV"), resulting in the analogies discussed below. However, we believe it is more than that. A successful joint venture, much like a successful football program, requires thoughtful planning during the inception phase, strong leadership with well-defined roles, and careful risk management. Coin-toss, kick-off, and read on to learn effective ways to make your JV perform like it is playing on the varsity team.

1. Get In Formation.

A JV may be created informally through oral agreements or through conduct of the entities involved. Even if the entities did not intend to create a JV, in those instances, both JV partners will be liable for the other's actions. The better practice is to enter into a formal JV agreement any time your company engages in conduct that could arguably be seen as a joint engagement with another company.

Formal JV agreements, clearly defining the material terms, allow clarity at the inception of the project and later should any problems arise. Federal government contracts require that JV agreements are in writing, and that each participant sign the contract and all bid documents. In further example, forming the JV prior to bidding on government jobs is a necessity; creating a JV after a bid is awarded will invalidate the award because the JV would create a distinct legal entity from the bidding entity.

It is also important to determine the corporate structure best suited for the JV — such as contractual, corporation, LLC, partnership, or limited partnership. This selection depends on the tax implications for all entities involved, liability and risk tolerance of the participants, complexity of the project, size of the participating entities, and Disadvantaged Business Enterprise ("DBE") participants and requirements. Unless otherwise defined, JVs are usually treated as general partnerships. In those instances, all participating entities will be responsible for the actions and conduct of the other JV entities. Defining the JV otherwise is preferred to limit the liability of all JV members, but it must be done through a formal agreement.

2. Who Is Calling The Plays?

Football games become a mess when the offensive coordinator, special teams and head coach get their wires crossed about who is handling what, and leadership of a JV is no exception. The JV Agreement should define the roles, responsibilities, and decision-making ability of each entity forming the JV. The project will be disjointed, and the schedule may be affected, if the members of the JV cannot agree on how to make decisions affecting the project and there is no mechanism in place for determining how critical path items will be decided.

Also, most government projects require that a DBE JV member assert majority control of the JV. If not, there is a chance the JV will lose the opportunity to bid or win public work. During the formation process, these types of requirements must be considered and addressed to ensure that the JV is able to procure its intended project.

3. Staying Off The Injured Reserve.

The JV may have been necessary to win the work, bond the project, or adequately manage the construction process. A well-documented JV agreement will likely provide the most protection for the additional risks associated with the JV as discussed above. The agreement should also include a dispute resolution plan for managing the JV among the entities forming the JV. Further, it is imperative that all members of the JV be included as named insureds on the JV's commercial general liability (CGL) insurance policy. Most CGL policies contain an exclusion for liability that is arising out of the conduct of any partnership or JV of which the insured is a party or member. In short, JV entities not listed are not covered.

4. Team Roster.

Staffing the JV is fundamental to the successful completion of the project. However, this can create additional liabilities. It must be clear that the employee is working for the JV, not the individual entities forming the JV. Best practices include having the employees who will work on the JV fill out new employment paperwork, such as I-9s, W-2s, etc., the distribution of company policies, handbook, and other company documents containing the JV name and logo, and employee e-mail addresses, accounts, and signature lines should identify the JV entity. Paychecks should be issued through the JV, and paystubs should be written from the JV account on JV checks (whether paper checks or electronic deposit). The human resource departments of the JV members should be involved in integration to ensure that the JV workforce is trained on their roles within the JV.

Game On!

The JV Agreement, or playbook, has been signed, managerial roles defined, liabilities accounted for, and the starting players selected – you are ready to drive down the field for a successful project.