Guest Essays

Construction Teaming Agreements – For Better or Worse

Alan B. Kim, Jr.

There is renewed interest in construction teaming relationships. For it is undisputed that construction is inherently risky but carries the potential for great reward. Teaming with the right partner can help the joint venture access profitable new markets and projects otherwise unreachable alone. The right partner can also help a party carry and manage the significant risks and volatility inherent in every project of any size.

Definitions of teaming or joint venture agreements vary greatly. Teaming can be as simple as agreeing in advance to hold weekly team meetings or as formal as creating a new legal entity between parties through which a project will be bid and, hopefully, constructed. No matter the definition, teaming involves collaboration, much like a marriage. Like most marriages, partners are bound to experience some growing pains. But some circumspection and elbow grease before any vows are taken can go a long way to minimize conflict and to create a successful lasting partnership.

Fundamental to evaluating a teaming relationship is an honest assessment of each party's goals, business philosophy, strengths, and weaknesses. Indeed, knowing who you aren't is as important as knowing who you are. For example, a firm may have a limited labor force but significant bonding capacity. The firm could be a fine partner for another with access to a larger reliable talent pool but less financial capacity. Joined together, the combined team could compete in a market within which neither could independently penetrate. On the other hand, and even being compatible in every other way, a firm with a fundamental top down management style may not blend well with a firm with a more horizontal management structure no matter how hard the parties may otherwise hope.

Often, team members decide to create a new and separate legal entity, such as an LLC, through which they will work and seek to bid and build projects. The LLC could be for a specific project or one which would be used on a going forward basis for multiple projects. One of the benefits of using a corporate structure is that there is a substantial and developed body of corporate law governing such entities, how they are managed, function, dissolved, etc. Also, most parties are well familiar with corporate formalities, issues of taxes and limited personal liability, etc. Hence, a corporate structure can provide a layer of predictability and familiarity to the process and its participants.

Whether a teaming relationship requires a corporate structure depends on the goals of the parties and nature of the project. But, whatever the project, it is always best to document the agreement between the partners at the outset, particularly when it involves a project of any size or significant risk. The devil can be in the details and the details often seem insurmountable. But the formalization of the agreement need not keep the parties from saying "I do." Indeed, with the resurgence of teaming relationships, new industry form contracts are being developed to help streamline and provide for consistency in the process. For example, the new ConsensusDocs™ 298 provides a form template for a joint venture relationship between contractors. Going further, ConsensusDocs™ 299 provides a form operating agreement for an LLC created by a team desiring to bid and build a project. Also new is ConsensusDocs™ 498 which provides a contract template for parties who desire to jointly bid on a design-build project and thereafter form a joint venture.

At first blush, ConsensusDocs 298 and 299 appear to be very fine starting points. (I have not yet studied ConsensusDocs 498, but expect it to follow suit). But be careful to presume that one-size-fits-all for every relationship. There are numerous issues which should be specifically considered and tailored to any partnership. For example, what is the value of what each party will bring to the relationship? One party may contribute money; the other, an intangible, such as relationships within the market. Also, how will each party's contributions be returned and jointly acquired assets divided should there be a divorce? Further, what are the tax implications of the relationship and how will profits and losses be carried?

All told, a teaming relationship can be as successful (or as disastrous) as any other relationship. Like many other relationships, a candid assessment of each party's goals, talents, and burdens is necessary to maximize the chances of relationship bliss. Accountants, lawyers, and executive coaches can be important advisors, too. Those advisors should be consulted to help the relationship succeed and provide for a happily ever after. If yet another advisor is needed, my Mother-In-Law is likely available for consult.

Attorney **Alan G. B. Kim, Jr.** is a Shareholder in the Madison office of von Briesen & Roper, s.c. Mr. Kim's practice focuses on construction law and environmental, commercial, real estate, contract and land use litigation matters. He is a 1991 graduate of the University of Wisconsin – Madison Law School. In addition to the Wisconsin Bar, Mr. Kim is also admitted to the District Courts for the Eastern and Western Districts of Wisconsin, Eastern District of Michigan, Washington D.C. District Court, and the U.S. Court of Appeals for the 6th and 7th Circuits. Mr. Kim is a member of NARI alongside Chris Jenny, where he serves on the Board as well as the Board for the NARI Education Foundation. He also lectures for various groups including NARI (with Chris Jenny), the State Bar of Wisconsin, the UW Madison and Madison College.

Questions? Comments? Please forward them to me, attorney Alan G. B. Kim, Jr., at akim@vonbriesen.com, (608) 661-3964, or von Briesen & Roper, s.c., 3 South Pinckney Street, Suite 1000, Madison, Wisconsin 53703.
