ARTICLES

Liability and the Single Project Joint Venture – An Overview

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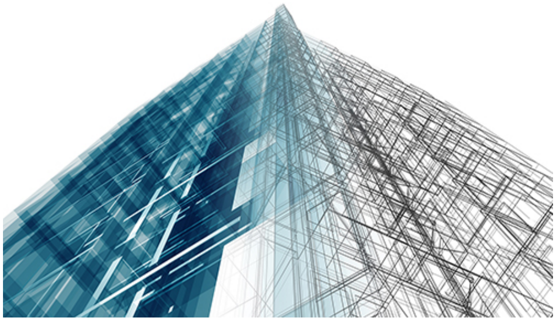
Mar 29, 2018

A joint venture is the combination of two or more firms established for a specified purpose and architectural and engineering (AE) firms form them regularly for a variety of reasons. While approaches vary – from stand-alone entity to in-name-only or one-subject partnership agreements – this article will focus on joint ventures established as a separate entity for the limited purpose of executing a single contract.



Single-project-focused joint ventures typically have a Federal Employer Identification Number but no employees, autos, leaseholds or other property. Services being provided by the joint venture partners are parceled out to the joint venture component firms.

Finding a partner that fits your culture, skillset, size, and past joint venture experience is important. A joint venture's work product brings liability for both partners however, so you'll also want to know:

- Who is their insurer
- What is the insurer's financial standing (A.M. Best rating)?
- Are their insurance limits adequate?
- How does their policy address joint venture coverage?
- How does their insurance or lack thereof, affect your liability exposure in a joint venture?

Once you settle on the right partner, your joint venture agreement will set the framework for how the partnership operates. The agreement should clearly outline the respective roles and responsibilities of the firms involved, including partner liability allocation and a dispute resolution procedure. Joint ventures are generally considered to have "joint and several liability." This means:

- Each firm is responsible for the partnership's actions.
- The joint venture, or a partner, can be named as defendant in a suit
- A claimant can possibly recover a full award from either or both parties.

Many state and local laws can affect your joint venture, so it is always wise to consult with knowledgeable legal counsel to properly construct your agreement.

Irrespective of who is the defendant, your joint venture agreement should spell out what happens in such a situation. One method is a 50/50 liability/defense until one party is found to be at fault. That party then takes over subsequent liability/defense. This works best when the partners have similar liability limits and policy forms. Better still is having similar limits with the same insurer, as it reduces chances either joint venture partner's insurer shirks their role in a claim.

Another method to cover joint venture liability is purchasing either a separate professional liability policy for the joint venture (likely at the joint venture's cost) or a Project Specific Policy. Not all professional liability policies provide joint venture coverage for the named insured's liability, but it is available and not uncommon. Either approach will result in an additional expense, with the Project Policy almost certainly being the more expensive of the two options.

The big issue with Project Policies is cost responsibility. Private project clients may balk at the cost and eliminate the requirement. With large public clients, the awarding agencies may choose to pick up the cost. In both scenarios, any claims that result from negligent acts, errors, or omissions on the part of the joint venture will be contained to that policy (unless inadequate limits are initially purchased, at which point your practice policy may act as an excess liability policy).

Neither of these two routes is without issue. If purchasing a separate professional liability policy for the joint venture, you would likely have, or want, to purchase extended reporting period or "tail" coverage upon project completion. Tail coverage may be available in multi-year blocks past policy expiration, but after that tail coverage runs its course so does the coverage. Extending the tail may be possible but consider:

- What if the insurer refuses to extend coverage?
- What if claims come in during the tail period making getting additional tail coverage impossible?
- Was tail coverage cost factored in your pricing?

With a Project Policy, purchasing tail coverage isn't as much of a concern. The length of the tail is bought upfront and built into the policy. Construction projects are not well known for running on time and/or under budget sot take special care when estimating the projected completion date. If a shorter than actually needed period is chosen upfront, it can be very costly to extend it in the future.

Some insurers may automatically build in a special additional margin of time for an extension and some may extend the policy for a short time at no additional cost (think 30 days or so). If your client is paying for the project policy they may not be amenable to the idea of paying more money later on because of project delays. If you are paying for the project policy it will be a direct hit to your bottom line.

Joint ventures can make a lot of sense for a particular project, but given the factors to be considered - financial incentives to potentially serious legal and insurance-related ramifications - it always makes sense to consult your legal and insurance advisors at the start to address any issues before they become problems.

RISK STRATEGIES

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