

# VDOT DBE Roundtable

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## Legal Issues in Teaming Arrangements And Joint Ventures



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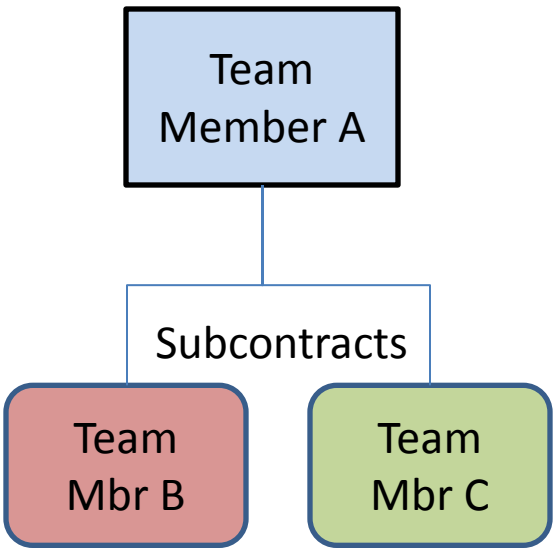
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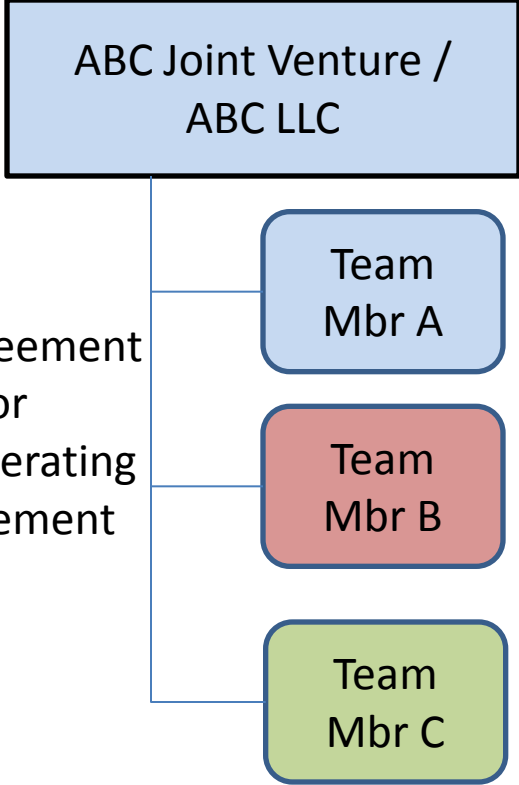
# Format of "Team"

## Prime / Subcontractor



Team ABC

## Joint Venture



# The Teaming Process

## Steps in the Teaming Process

Initial Discussions

Define Key Business Terms

Proposal / Bid Submission

Formalizing the Teaming Arrangement

## Agreements

Non-Disclosure Agreement  
Confidentiality Agreement

Memorandum of Agreement  
Memorandum of Understanding  
Letter of Intent

Teaming Agreement

Subcontract  
Joint Venture Agreement  
Operating Agreement (LLC)

# Non-Disclosure Agreements

- Allows controlled and confidential exchange of critical financial and operational information
- Intended to be enforceable agreement
- See “Checklist” in handout

## MOU / MOA / LOI

- Often used at preliminary stage of discussions
- States essential business terms of agreement between team members
  - Purpose and organization of team
  - Allocation of work
  - Management of team
- Binding contract or not ? It depends.

# Teaming Agreement

- Contents
  - Format of team
  - Each participants contribution of resources and allocation of work
  - Exclusivity of relationship
  - Consistency with prime contract
  - Dispute resolution
- Binding contract or not ? It depends.
- See “Checklist” in handout

# Joint Venture

- Characteristics
  - Mutual benefit and goal
  - All share in profits and losses
  - Share in management of venture
- Can take many forms – most commonly:
  - LLC
  - Unincorporated JV – like partnership for single purpose

# Joint Venture

- Advantages of LLC form
  - Recognized legal entity
  - Limitation of liability – separate from members
  - Flexible management structure
  - Can distribute profits and losses as you wish

# Dispute Resolution

- Goals
  - Prompt resolution
  - Maximize “money in your pocket” at the end of the process
  - Preserve business relationships
  - Maintain business reputation

# Traditional Dispute Resolution

- Negotiation
  - Resolves most disputes
- Litigation

# What's wrong with litigation ?

- Slow process – maybe years to resolve
- Right to extensive “discovery” = \$\$\$
- Litigation is “local”
  - Local judges, local jury, local procedures, local lawyers
- Procedure is technical
  - Complicated rules of evidence & procedure
  - You can lose your case on technicalities

# What's wrong with litigation ?

- Judge / jury are not construction professionals
- It's a public process – press coverage
- Loser has right to appeal
  - A “win” may not be a “win” after all
- Reinforces adversarial positions with business partners
  - A “win-lose” process

# Litigation May be Only Option

- Public or government agencies usually don't agree to binding arbitration or ADR
- “Injunctive Relief” usually obtained from a court
- Award or Settlement from arbitration or mediation may need to be enforced in a court
- Statutory rights & claims
  - Payment bond claims under “Miller Act” & VA “Little Miller Act”

# Alternative Dispute Resolution (ADR)

- Mediation
- Arbitration
- Other processes
  - Dispute Resolution Boards
  - Early Neutral Evaluation
  - Mini-trial
- ADR is governed by your contract !

# Mediation

- A structured negotiation process...
- ...facilitated by a 3<sup>rd</sup> party “neutral mediator” ....
- ...to encourage voluntary settlement of disputes.

# Mediation Characteristics

- Voluntary process – mediator cannot compel settlement or decide case
- Confidential
- Discussions cannot be used in court
- Parties can select neutral mediator
- Format is flexible
  - Evaluative vs. Non-Evaluative
- Lawyers not required

# Why is mediation successful ?

- Mediator is an impartial advocate for settlement
  - Challenges / tests parties' position in dispute
  - Can offer independent view of issues
  - Can get to underlying (unspoken) issues
- Confidentiality
  - Parties can communicate confidentially with mediator to address underlying goals & issues
  - Discussions cannot be used against parties in litigation if no settlement is obtained

# Why is mediation successful ?

- Flexibility in solutions – more so than court
  - Can be a “win-win” process
  - Preserve business relationship
- Settlement can be enforceable if incorporated into written agreement or court order
- But, all Parties must be motivated to settle.
- 
- Cost is much less than arbitration or litigation.

# Keys to successful mediation

- Most Important - Selection of right mediator
- Right people attend mediation – all important interests represented
- Timing of mediation
- Preparation
- Think about other party's interests and positions

# Arbitration

- A creature of contract
- A process for selecting 3<sup>rd</sup> parties to decide & resolve the dispute
  - Usually binding, but can be “non-binding”

# Choosing an Arbitrator

- Single Arbitrator vs. Panel of 3
  - Look to your contract
- Selected by parties or appointed by some sponsoring organization
- Neutral vs. Party-appointed arbitrators

# Arbitration Rules

- No universally applicable rules - must be specified in your contract
- American Arbitration Association (AAA)
  - Construction Industry Rules of the American Arbitration Association
    - Fast Track Procedures for cases < \$75,000
    - Regular Cases
    - Large Complex Case Rules

# Arbitration Advantages

- Knowledgeable decision-makers
- Faster than litigation (usually)
- Limited discovery (= lower cost)
- Streamlined, flexible procedure (= lower cost)
  - Informal rules of evidence & procedure
  - Few technicalities
- Limited appeals

# Keys to Successful Arbitration

- Selection of arbitrator(s)
- Selection of counsel with experience in arbitration and subject matter of dispute.
- Preparation of case for clear and concise presentation to panel.