

**OAME/AGC COLLABORATION
ISSUE #2**

**FORMAL AND INFORMAL
METHODS TO GROW
D/M/W/ESB CAPACITY**



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INTRODUCTION

In April 2001, the Oregon Association of Minority Entrepreneurs (OAME) and the Associated General Contractors, Oregon-Columbia Chapter (AGC) entered into a collaborative working relationship to find solutions to issues of concern to women- and minority-owned and emerging small construction companies.

OAME surveyed its construction contractor members to develop a list of issues. From this list, a representative group from each organization determined that four would be of greatest benefit to both groups to pursue. Those four issues were prioritized, and OAME and AGC committed to addressing each issue and producing a report of their findings at the conclusion. The issues are:

- Prompt Payment
- Exploring opportunities for minority contractors to grow capacity (such as joint venturing)
- Bonding
- Developing an AGC system for reporting minority contractor utilization

This whitepaper is the result of work completed by following members of OAME and AGC:

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It is the intent of both OAME and AGC to use the findings of this white paper to educate the contracting community about opportunities that exist for D/M/W/ESB contractors to grow their capacity through formal and informal business relationships.

PROBLEM DEFINITION

Disadvantaged/Minority/Women/Emerging Small Business contractors can experience difficulty successfully competing for large prime contracts or subcontracts because of their size, experience, capacity to bond or provide an adequate workforce. They seek options for formal and informal business relationships that will help them meet the requirements of a specific contract but will also help them grow their capacity to do future work.

The most often cited solution to this problem is joint venturing between a smaller D/M/W/ESB and a larger firm; however, this solution also carries with it a variety of problems of which a contractor must be aware before proceeding.

During the meetings of the OAME and AGC members, several options were discussed and assessed for their pros and cons. Three options emerged as the most beneficial ways for smaller contractors to compete on larger contracts and grow their capacity. Those were:

- Joint ventures
- Partnering
- General contractor sizing of subcontracts

Each of these options is discussed in the pages that follow.

JOINT VENTURES

Joint ventures have been used successfully for many years. It is the experience of the OAME and AGC members who worked on this issue that joint ventures, if executed properly, can be very effective. It has been noted, however, that companies should not enter into a joint venture lightly. It is equally important for companies contemplating a joint venture to weigh the risks as well as the rewards.

The following reasons were listed by contractors for entering into a joint venture:

- **Location of Project:** If a private client has an established relationship with a general contractor, but the general has not done work in the new project location, it may be in the general contractor's best interest to joint venture with a local contractor rather than try to move his/her operation to this new location.
- **Size of Project:** If the project is larger than normal, the contractor may not have the workforce or the bonding capacity to do the work without a joint venture
- **Complexity of Project:** The contractor may not have expertise in a specific aspect of the project but wants to move into this market; therefore, joint venturing can help him/her learn and establish a presence.
- **Client Relationship:** A contractor may not have the immediate capacity to meet the needs of a good client, but does not want to harm the relationship. Therefore, rather than losing the client to a competitor, additional capacity is generated through a joint venture.
- **Minority Requirements:** Joint ventures can be used by generals and subs to meet minority requirements in contracts.
- **Targeting a Partner for a Specific Type of Work:** A contractor may be able to complete all of the project except a specific, technical portion (i.e. work on a clean room) and seeks a joint venture with another contractor that has that specific expertise.
- **Help With Management Team:** Management team is smaller due to other projects at the same time; therefore seek only management skills from the joint venture.
- **Opportunity to Learn Something:** When contracts require previous experience in a specific project type or process but a contractor has none, a joint venture can be used to learn the new way of doing the project.
- **Risk Allocation:** One contractor seeks a partner with specific experience to help cover the risk.
- **Bonding Capacity:** If the project size or the amount of business currently bonded on other projects results in lack of bonding capacity, a general contractor may find a joint venture will provide the needed bonding capacity.

It was noted, however, that joint venturing, if not done correctly, can lead to disastrous results. The following issues were noted by the committee as critical to understand if the joint venture is to succeed:

- Working capital – how much is each joint venture partner contributing?
- Address tools and equipment rental and sales.

- Who is the project leader? It can be confusing if the joint venture partners do not stipulate up front who is responsible for making decisions and communicating with the owner.
- Each partner needs to understand how expenses for overhead are to be allocated.
- Responsibilities of each team member
- Separate books must be kept for the project.
- Cost of partners in the fee or in the work?
- Who is going to take care of the project liability after completion? Who is responsible for the warrantee?
- Who is responsible for licensing and other state requirements?
- Unforeseen events – what happens if a partner dies or goes bankrupt during the project?
- EEO certification – does the joint venture need to be re-certified?
- Don't surprise an owner; be up front at the beginning.
- How will the profit be split? It is critical to understand the difference between profit margins of the joint venture partners and how this will affect the split of profits on this project.

Susan Ford, Bullivant, Houser, Bailey, made the following observations about joint ventures:

- Joint ventures can be organized as a corporation, partnership, limited partnership, or a Limited Liability Corporation (LLC). LLCs are the preferred vehicle because they are taxed like a partnership but have the liability protections of a corporation.
- Benefits of Joint Venture LLCs
 1. Members able to participate in management decisions without risking limited liability status (unlike limited partners)
 2. Flow through rather than double taxation (plus member can deduct losses)
 3. Ownership share need not have any relationship to ability to operate and control affairs
 4. Limited liability (as long as adequate capitalization and certain formalities are followed)
 5. Combine need for financial resources and need for technical knowledge with limited liability. Could be an excellent vehicle for partners with dissimilar assets to contribute – intellectual property vs. cash vs. geographic location. *LLCs are preferable to other business forms because typically “He who has the gold...rules.” But in an LLC, a person without capital can be the ruling/controlling partner. For a small company with expertise but no capital, the LLC is the way to go.*
- Detriments of JVs and LLCs
 1. Can be easy for owner to sue when there is a single source of responsibility for both design and construction
 2. Although often undercapitalized in order to avoid paying judgments, undercapitalization can lead to “piercing of LLC veil.”
 3. Owner may require personal guaranties from individual members.
 4. Lack of indemnification agreements between members may result in lawsuits between joint venturers where risks and responsibilities are not shared equally.
 5. Difficulties where each member has an equal share of control.
- Joint Ventures and DBE/MBE/WBE/SBE Contractors

1. Federal Projects – 49 CFR 26 will apply – the contractor should talk with the purchasing agent and confirm in writing what the specific requirements are for the project if a joint venture is used.
2. State Projects – Bidders for Board of Higher Education Programs need to show good faith efforts to subcontract or establish joint ventures with minority, women and small business enterprises. OAR 580-050-0040.
3. Otherwise, OARs and Oregon Revised Statutes silent with respect to joint ventures.

The experience of the committee members was mixed with regard to requirements for a joint venture to be re-certified as a D/M/W/ESB when one of the joint venture partners is certified as an individual company.

Rhonnda Edmiston, Port of Portland, responded that the Port would require the new joint venture company to re-certify.

Lydia Muniz, Governor's Office on Women and Minority Programs, provided the following information:

“If the DBE/MBE is already certified and is merely partnering with a non-DBE firm on a joint venture project in the area of work in which the DBE/MBE is certified, then they (as partners) would not need to go through the certification process. The flip side of this, I'm assuming, is that if it is a type of project or code that the DBE is not currently certified in, then the DBE would need to go through the process of getting certified in that area of service.

In order to do a joint venture project, they would need to go through the "joint venture process" which is by application to the contracting agency. In Oregon, the only state agency that would oversee and determine eligibility for a joint venture is ODOT. ODOT has a process in place that has already been submitted to and approved by their federal partner, FHWA. Other entities that receive federal dollars, such as the Port, would have their own joint venture process approved through their federal agency tie, FAA.

ODOT would review the joint venture application and make a determination on whether the DBE would be performing an appropriate portion of the project. The application would need to set forth specifically what the DBE firm is responsible for and what the non-DBE would do.

The Certification Office is not at all involved with the joint venture application, only ODOT would be for state DBE projects, but the DBE/MBE must be certified prior to applying on a joint venture project.

This information was provided by Rick Whelan of the ODOT DBE Program/Office of Civil Rights. For more information or clarification, Rick can be reached at 986-4356.”

Specific information about creating a joint venture and suggested contract forms are available in Attachment 1.

PARTNERING

The term “partnering” was used by the members of the committee to describe a less formal relationship than a joint venture.

In one case, a large electrical subcontractor re-bid a portion of his work to a smaller minority-owned electrical contractor. This was an effective way for the smaller electrical contractor to work with both the larger subcontractor and the prime on a very visible public project. As a result, a relationship was established that has led to ongoing work together.

On another project, the CM/GC sought out two subcontractors (one a DBE, one a majority owned) to work together on different aspects of the project. He initiated the contact between the subcontractors and then stepped away so that they could establish a relationship. They established how they would work together by initiating a memorandum of agreement that described two areas of work – one in which the larger company Primed and the second where the DBE Primed. They discussed payment arrangements, supplies and met members of each other’s team. To support the personal relationship the DBE partner initiated lunch meetings, and they even got their families together and attended a ballet. Both parties considered this a successful endeavor and plan to do it again.

GENERAL CONTRACTOR SIZING

A final alternative which allows small D/M/W/ESB contractors to grow their capacity without joining forces with another contractor is a situation where the general contractor or prime contractor makes a decision to break work that is to be done by subcontractors into small enough projects that they can be handled by individual companies.

Some general contractors have found that they would rather bring someone in as a subcontractor so they don't give up control of the project rather than joint venturing or partnering. This is particularly the case when a general has an expertise or market niche that they want to keep.

It was noted that it is important to identify the amount of work the subcontractors can handle. A subcontractor who has established a relationship with the general contractor prior to the project will have a better chance of being successful. An example of how work can be broken into smaller contracts was offered; the general contractor split the work for painters to inside and out, walls and floors, so that multiple subcontracts are established rather than just one.

CONCLUSIONS

The OAME/AGC working group concluded that there are several different ways for D/M/W/ESB construction companies to increase their capacity; however, each of the tools mentioned in this whitepaper create liability and risk allocation issues that should be carefully evaluated before any company pursues it.

NEXT STEPS

The working group agreed to the following steps to make others aware of this information:

- Present the whitepaper at the October OAME Contractors' Meeting. If there is enough interest, a brown bag seminar on joint ventures will be scheduled in 2003
- The whitepaper will be posted on the AGC and OAME websites
- Hardcopies of this and other OAME/AGC whitepapers will be available in hardcopy at OAME

ATTACHMENT 1

The following is excerpted with permission from the AGC Oregon-Columbia Contractors' Management Guide. This information is offered for guidance only. Any company pursuing a joint venture should not rely solely on this information and should seek legal counsel and insurance expertise.

Joint Ventures

Joint ventures are the convenient marriage of two or more contractors for the purpose of turning a profit. The joint venture is an attractive mechanism through which a team can be put together to take on a project where, working independently, either partner might not otherwise be able to bid. The combination of specialized estimating capabilities, knowledge of specific geographic areas, and resources of personnel, equipment, and financing all contribute to the logic behind a properly structured joint venture. This chapter will discuss the type of information the surety likes to see in place when two or more joint venture partners come together. In addition, the chapter provides sample joint venture documents familiar to the surety industry.

EXHIBIT A¹ JOINT VENTURE CHECKLIST

All joint ventures are different, and agreements should be tailored to fit both project and participants; however, the following is a basic checklist of provisions that should be included in the joint venture agreement.

1. The date on which the agreement is established and executed.
2. The names, addresses, and identification of the type of business form of each member of the joint venture.
3. The name under which the joint venture shall do business.
4. A full description of the project.
5. A statement that the parties are actually joint venturers for the project, whether or not the construction contract is in the name of all members.

¹ Material for exhibits taken from the NASBP publication, *Joint Ventures*, by Richard W. Miller, Esq.

6. The establishment of a fund by the parties to finance the work, together with the amounts to be contributed by each party, with the fund being deposited in a special earmarked bank account, under dual control, and all progress payments and other income being deposited in such account.
7. A clause providing that, if additional working capital is required, the parties will proportionally contribute additional funds, as needed and the effect on the parties of a failure to do so.
8. A declaration of the participation of the parties and percentage in which profits and losses are shared should be set forth. Usually, these percentages are the same percentages as the contributions to the working fund, but the amount of contribution of funds by parties can be increased or decreased depending on the contributions of equipment, which also must be considered.
9. Payment of any fee to the controlling joint venturer or sponsor should be specified whether a share of the profits in excess of that contemplated is given to the controlling manager or a flat dollar sum is paid.
10. If equipment is involved, a specific clause should be inserted, especially where the parties contribute varying amounts of equipment
11. The parties to the joint venture should agree to sign all necessary documents relating to the contract, bank loans, bonds, indemnity agreements, and the like.
12. Designation of one of the joint venturers as general manager of the project, with authority to bind the joint venture, should be included with a provision clearly defining not only the managerial duties, but all other duties of the parties and procedures to be followed in dealing with unusual situations or problems that may develop.
13. Items to be charged to the job and the arrangements for a separate set of books kept by an outside CPA should be specified.
14. The possibility of death, bankruptcy, or insolvency of a member must be handled.
15. The acquisition of equipment and materials by the joint venture and the disposal of such equipment and material, either by sale, with the proceeds treated as ordinary income, or by distributing them to the parties.
16. Provide for the acquisition of licenses in the name of the joint venture or each venturer as required.
17. Specify the type of insurance carried by the joint venture and clearly define what liabilities are to be insured against by each participant.
18. Define items which are to be considered as costs to the joint venture for the purpose of determining profit or loss, and describe those items which are not reimbursable to member of the joint venture.

19. Set forth when and how the joint venture is terminated and how such items as guarantees, defects, and insurance, will be handled after termination.
20. Designate the state under which the provisions of the joint venture will be intercepted.

Pre-Bid Joint Venture Agreements

Three pre-bid agreement formats are commonly used that, while accomplishing the same purpose, successively provide more detail and clarification for the parties involved. The first agreement, "Declaration of Joint Venture Agreement," identifies the parties and provides that if the bid is accepted and the contract awarded, each of the parties, as joint venturers, will perform the contract and enter into the necessary indemnity agreements with the surety if, in fact, bonds are required by the owner.

The second document, "Pre-Bidding Agreement," goes further than the declaration agreement in that it describes the partners' percentage of involvement, the sponsor or managing partner, termination, and the fact that a more specific final agreement will be entered into.

The third agreement, "Pre-Bidding Agreement – 2," combines both pre- and final joint-venture provisions, negating the need for two separate documents.

**EXHIBIT B
DECLARATION OF JOINT VENTURE AGREEMENT**

And _____

Hereby agree as follows:

1. That the bid submitted or to be submitted in the name of _____
to _____
in the amount of \$ _____ or thereabouts, for _____

_____ is in fact for and on behalf of said _____
and _____

_____ who hereby declare that they are joint venturers in the submission of said bid, notwithstanding the fact that the proposal is being made in the name of _____ alone.

2. That if the bid of said _____ is accepted and a contract awarded, the parties hereto as joint venturers will perform said contract and will share in the profit or loss which may result therefrom in the proportions that their several interests bear to the whole.
3. That if a final bond or bonds (i.e. a performance bond or labor and material (payment) bond, or both) are required to be furnished in connection with said contract, then the parties hereto as joint venturers, and each of them, will execute the customary application of the surety, providing such bond or bonds are required, obligating themselves thereby severally and jointly to perform, abide by and be subject to all the agreements in said application contained and in addition to indemnify and save harmless said surety in the same manner and to the same extent as if they, and each of them, were named as principals in said contract and in said bond or bonds.
4. That an executed copy of this agreement shall be furnished to said surety by the joint venturers, they agreeing that it, by its terms and obligations, constitutes one of the inducements to said surety to provide said bond or bonds.
5. That this agreement shall, in all its terms and obligations, in addition to being for the benefit of said surety, be also for the benefit of any other surety or sureties joining with said surety in executing said bond or bonds or executing at the request of said surety said bond or bonds, as well as any surety or sureties assuming reinsurance thereupon.

Date at _____ this _____ day of _____ 20_____ .

Signed _____

**EXHIBIT C
PRE-BIDDING AGREEMENT**

This Pre-Bidding Agreement entered into as of this _____ day of _____
20_____, by and between the following parties:

and _____

WITNESSETH:

WHEREAS, the parties hereto desire to submit a joint bid to _____
(hereinafter referred to as "Owner"), for the construction of _____
_____ (herein called "Work").

WHEREAS, the parties each hereby certify and represent it to each other their ability to provide their share of finances, personnel, equipment, and supervision to complete the construction project in the event they are the successful bidder, and to sustain and pay for any losses that may be incurred.

NOW, THEREFORE, it is hereby agree between the parties hereto as following:

1. They will jointly prepare and submit a bid or proposal to the Owner for a contract for the construction of the work.
2. The bids or proposals shall be submitted in the names of the undersigned as joint ventures and that, should a contract or contracts for said work be obtained as a result of such negotiations, bids, or proposals, such contract or contracts shall be taken in the names of the undersigned as joint venturers, or in such other name as may be agreed upon by the undersigned with the consent and approval of the Owner.
3. Each and every obligation created by any such bid, proposal, or contract shall be the joint and several obligation of the undersigned.
4. The interest of the undersigned in any such contract, if obtained, and in the work to be performed thereunder, shall be as follows:

_____	_____	% - Managing Party
_____	_____	%
_____	_____	%
_____	_____	%

5. The undersigned jointly shall execute (with each of the undersigned designating its own broker for its portion of the bond) any and all indemnity agreements required by the surety or sureties on any bonds furnished in connection with the award or performance of any such contract, and each shall assume and bear its proportionate share (as designated in Paragraph 4 above) of any loss which may result therefrom, and each of the undersigned shall contribute, when and as

required, its ratable proportion of all amounts needed for working capital, tools, equipment, and other items required for the performance of the work.

6. All expenses incurred by the parties hereto, or any of them, in estimating and preparing the contemplated bid shall be borne separately by each of the parties and shall in no manner be considered as part of the construction cost of the project in the event the work is awarded to the joint venture.
7. In the event that no agreement is reached by the parties hereto as to the amount of the bid to be submitted or if such agreement is reached and a bid submitted but no contract is offered or awarded to the joint venture, then this Agreement shall be of no further force and effect, and any joint venture relationship or joint venture between the parties for said project shall automatically terminate.
8. The part so designated in Paragraph 4 hereof shall be the Managing Party, subject, however, to the superior authority and control of the joint venturers. The Managing Party shall have direct charge over and supervision of all matters necessary to and connected with the performance of said contract, and the undersigned shall, if necessary or advisable, execute and deliver to the Managing Party or a project manager designated by it from time to time a power of attorney sufficiently broad to enable said Managing Party, or the project manager designated by it or both to perform properly and promptly such duties and responsibilities.
9. Any profits or gains arising from the performance of the contract shall be apportioned to all the parties in the same proportions as set forth in Paragraph 4. In the event of any losses arising from the performance of the contract, each party shall assume and pay its full proportionate share as such proportions are fixed in Paragraph 4.
10. Incident to the performance of the contract, the Managing Party, direct or through the project manager acting for it at the time, may execute and deliver, in the name and on behalf of the joint venture, such purchase orders, rental agreements, subcontracts, and other agreements for the acquisition of materials, labor, equipment, facilities, and work as the Managing Party may deem necessary or advisable.
11. Incident to the performance of the contract, equipment may be rented from any member of the joint venture, including the Managing Party, at fair and reasonable rates. Upon completion of the project, the Managing Party will secure a bona fide bid for each item or group of items of equipment purchased by or for the joint venture from one or more reputable equipment dealers, and each of the parties shall have the right to purchase any item or group of items at the highest prices bid therefore by such dealers, but no party without the prior written consent of all other parties shall be entitled to purchase a greater per centum of such equipment than the percentage of its interest in the joint venture. All equipment not so disposed of shall be sold by the Managing Party for the best price obtainable to outsiders.
12. In the event, during performance of the contract, any party shall become insolvent or bankrupt or take advantage of any bankruptcy, arrangement, or debtor statute in force at the time, said

party shall cease to have any voice in the joint venture from and after that date, but the liability and responsibility of that party to the others shall be in full force and effect.

13. This Pre-Bidding Agreement is limited and relates only to the work described in Paragraph 1 above and to any additions thereto or modifications thereof and to no other, and upon the completion of the work and its acceptance by the Owner and the performance of all obligations of the undersigned under such contract, a final accounting and settlement shall be made by and among the undersigned and thereupon this agreement shall terminate and come to an end.
14. Upon being awarded a contract for the above-described work, the undersigned, if requested to do so by the Managing Party, will enter into a Joint Venture Agreement more specifically defining their respective interests in and obligations under such contract as among themselves, and providing a practical method for their collaboration and cooperation in performing the work, and in such agreement there shall be incorporated all of the provisions contained in this Pre-Bidding Agreement as well as others deemed proper and advisable. Until and unless a Joint Venture Agreement is so executed, the provisions hereof shall constitute the sole and only agreement of the parties concerning said project.

Executed in multiple the date and year above written.

By: _____

By: _____

By: _____

By: _____

EXHIBIT D

PRE-BIDDING AGREEMENT – 2

This agreement, executed this _____ day of, _____ 20, _____ between _____ and _____, is made with reference to the following facts:

- A. The _____ has invited bids for construction of _____, Specification No. _____, and addenda thereto, if any (herein called “Contract”).
- B. _____ and _____ intend by this agreement (1) to constitute themselves a joint venture to submit a bid for the performance of the Contract, and if the Contract is awarded to the joint venture, to perform the Contract, and (2) to specify their respective rights and obligations between themselves with respect to the submission of the bid, the performance of the Contract, the manner in which the profits or losses therefrom shall be shared or borne, and all other matters pertaining to the joint venture.

THEREFORE, the parties agree as follows:

1. The parties hereby constitute themselves a joint venture (“Joint Venture”) for the sole and exclusive purpose of submitting a bid for the performance of the Contract and, if the Contract is awarded to the Joint Venture, of performing the Contract. The Joint Venture and this agreement shall terminate if the parties do not agree on the terms of the bid; if the Contract is not awarded to the Joint Venture; or when the performance of the Contract has been completed, as the case may be, and when the accounts are settled between the parties in accordance with the terms hereof. This Agreement shall not limit either party from engaging in other business for its own respective account.
2. The parties will prepare, execute, and submit a bid for the performance of the Contract in an amount or amounts and on terms mutually agreed upon prior to its submission, and will execute and submit all bid bonds required in connection therewith. The bid shall be made in the names of the parties or under a mutually agreed upon fictitious name.
3. Unless otherwise mutually agreed in writing, all costs and expenses incurred in connection with the preparation of the bid, the submission of the bid, and all other matters up to the date of the award of the Contract shall be borne by the party which incurred the same.
4. The parties hereby jointly and severally appoint and constitute _____ and _____, and each of them, as their true and lawful attorneys-in-fact, with full power and authority, severally for and on behalf of the Joint Venture, and each of the parties hereby ratify and confirm the signature of either of said attorneys-in-fact on any said documents as the act and deed of the Joint Venture and each of the parties.
5. Except as is otherwise provided in Paragraphs 3, 6, and 13, the parties shall share the profits or bear the losses of the Joint Venture and shall own all of the property and funds acquired by the

Joint Venture in the following proportion (their "Proportionate Share," as the same may be changed from time to time with respect to the sharing of profits and ownership or property and funds, pursuant to Paragraphs 6 or 13, but not as to the bearing of losses or as to the obligation to contribute to working capital):

_____ %
_____ %

Each party agrees to indemnify the other against any loss or liability in excess of said proportion by reason of any liability incurred or loss sustained in connection with or arising out of (a) the performance of the Contract; (b) any bonds to which the Joint Venture is a party; (c) any indemnity agreements executed in connection with any such bonds; and (d) the Joint Venture, generally.

6. The parties from time to time shall determine the amount of working capital required to perform the Contract or, if the parties are unable to so agree, the largest amount which either party in good faith specifies shall be deemed to be the amount of working capital determined to be required to perform the Contract. Each party shall contribute to the Joint Venture its Proportionate Share of the amount so determined within ten (10) days after each determination is made. If either party shall fail to contribute all its Proportionate Share when due and if such default shall continue for ten days after written notice from the non-defaulting party, the non-defaulting party shall contribute the deficiency in the proportionate share of the defaulting party. In such event, and regardless of any later offer by the defaulting party to remedy its default or the later remedy by the defaulting party of its default, the Proportionate Share of each party in the profits of the Joint Venture and in the ownership of all property and funds thereafter acquired by the Joint Venture automatically shall change to the respective proportions that the total amount contributed to working capital by each party bears to the total amount contributed to working capital by both parties (exclusive of any amount later contributed by a defaulting party); but the Proportionate Share of each party in any losses of the Joint Venture shall remain as specified in Paragraph 5. In addition to the foregoing, the non-defaulting party shall have the right to assert against the defaulting party any and all remedies therefore provided by law.
7. When the Joint Venture has funds in excess of its working capital requirements, as determined from time to time by the parties, the Proportionate Share of each party in such excess shall be paid to the parties. Either party may withdraw funds from the Joint Venture with the consent of the other party. Any such withdrawal shall not of itself, unless otherwise agreed, change the Proportionate Share of either party.
8. All funds received by the Joint Venture from any source shall be deposited in an account or accounts in the name of the Joint Venture in such bank or banks and shall be subject to withdrawal by such person or persons as the parties shall determine from time to time.

9. Each party shall own its Proportionate Share of all equipment, machines, tools, materials, supplies, and other property which is purchased by the Joint Venture or charged to the account of the Joint Venture. At the completion of the Contract, or sooner if such property no longer is required for the performance of the Contract, such property shall be divided between the parties in a manner agreed upon by the parties. If the parties are unable to agree on the division of some or all of such property, the property on which the parties are unable to agree shall be sold, and each party shall be paid its Proportionate Share of the sale proceeds. All funds and property acquired by the Joint Venture shall be held in the name of the Joint Venture.

10. Separate books of account of the transactions of the Joint Venture shall be kept and maintained by the managing party at its principal office or at the job site, and the same shall be available for inspection by either party at any reasonable time. The books of the Joint Venture shall be maintained on a percentage of completion basis and the tax returns of the Joint Venture shall be prepared on a completed contract basis. The managing party shall furnish the other party or parties, from time to time, with such statements and reports relating to the progress of the performance of the Contract and to the financial condition of the Joint Venture as the other party reasonably may request. At the completion of the Contract and at such intervals as the parties may agree upon, each party shall be furnished with a complete account of the receipts and disbursements of the Joint Venture. At December 31 of each year during the existence of the Joint Venture and at the completion of the Contract, if requested by either party, the accounts of the Joint Venture shall be audited by a mutually acceptable firm of independent CPAs. Each such audit shall be performed in a manner which will permit the accountants to express an unqualified accountants' opinion with respect to the financial statements of the Joint Venture if the existing facts warrant such an unqualified opinion. The cost of each audit shall be borne by the Joint Venture

11. When the Contract has been fully completed and accepted, and after the Joint Venture has paid or provided for (a) all costs incurred in connection with the performance of the Contract and by the Joint Venture; (b) all claims not fully covered by insurance; (c) reserves for all claims made or threatened against the Joint Venture; and (d) reserves for contingencies, if any, that the parties shall determine to be advisable, and after repaying to each party the amount advanced by it to the Joint Venture as working capital, the Proportionate Share of each party in the profits then remaining shall be distributed to each party. The amount of each reserve, or the remaining balance thereof, shall be similarly distributed when the same no longer is required.

12. Each party shall have an equal voice in the management of the Joint Venture, and the parties shall agree from time to time on the methods and manner of performance of the Contract and on the management powers and duties to be delegated to the managing party, to persons specified in Paragraph 4, and to any other person or persons. Subject to the foregoing, the managing party shall be _____. The managing party shall be responsible for the direct management and supervision of the performance of the Contract. At the completion of the Contract and when the receipts and disbursements of the Joint Venture have been finally determined, if the Joint Venture made a profit, the Joint Venture shall pay the

managing party a management fee in an amount equal to ten percent (10%) of such profit. The management fee shall be charged to the Joint Venture as a direct cost. If the Joint Venture does not make a profit, the managing party shall not be entitled to a management fee. The parties shall furnish from their respective organizations, to the extent available, all of the personnel, skill, experience, and knowledge which is required to perform the Contract efficiently and expeditiously.

13. If either party shall be adjudged to be bankrupt or make an assignment for the benefit of its creditors, or if a receiver is appointed to take over all or substantially all of its assets, then (a) the Joint Venture automatically shall terminate; (b) such party shall have no further voice in the performance of the Contract; (c) such party's Proportionate Share of the Joint Venture's profit (determined after the performance of the Contract has been completed and accepted) shall be limited to such party's Proportionate Share of the proportion of such profit which the Joint Venture's direct and overhead costs paid or accrued to the end of the month during which the Joint Venture terminates. Pursuant to this, Paragraph 13 bears to the Joint Venture's direct and overhead costs paid or accrued to the completion and acceptance of the Contract, but such party's Proportionate Share of any losses of the Joint Venture shall remain as specified in Paragraph 5 (the books of account maintained by the Joint Venture shall be conclusive for all purposes hereunder); and (d) the other party shall do all things necessary to complete the performance of the Contract and to wind up the affairs of the Joint Venture; collect all obligations due to it; pay all obligations owed by it, and distribute the assets.

14. _____ owns the equipment which is described in Exhibit 1 hereto and _____ owns the equipment which is described in Exhibit 2 hereto. To the greatest extent possible, each party shall make the equipment which it owns available for use by the Joint Venture and the Joint Venture shall use the same to the greatest extent possible in the performance of the Contract. For the use of the equipment, the Joint Venture shall pay the party which owns the equipment used (the "Owner") the applicable daily, weekly, or monthly rental rate specified on the relevant exhibit, whichever results in the lowest rental, for the period commencing with the time at which the equipment is delivered to the job site and ending with the time when the Joint Venture informs the Owner that the equipment no longer is needed for use by the Joint Venture. The Joint Venture shall bear the cost of operating the equipment, of tires and tubes worn or damaged by careless conditions, and of section and spot repairs. The Owner shall fully insure the equipment, at its costs, and the Joint Venture shall not be responsible for the loss of or any damage to the equipment while it is in the custody or control of the Joint Venture, provided that the Joint Venture shall bear (a) the portion of the cost of the loss of or damage to the equipment which is covered by the Owner's insurance and which is not reimbursed to the Owner by such insurance, but not in excess of \$1,000 per occurrence with respect to heavy equipment, \$250 per occurrence with respect to trucks, and \$100 per occurrence with respect to automobiles; and (b) the cost of the loss of or damage to equipment which is not covered by the Owner's insurance. The Joint Venture will provide appropriate supervisory and accounting controls to maintain an accurate and complete record of the various types of such equipment which are employed, of the Owner thereof, and the time spent by each in the performance of the Contract. Each Owner shall submit a statement

to the Joint Venture each month for the rental of that Owner's equipment which has been earned during the preceding month. Each statement shall be in such detail as the other Owner reasonably shall require.

15. Neither party shall have the right to borrow money on behalf of the Joint Venture or use the credit of the other party for any purpose.
16. All bid, performance, labor and material, maintenance, and other types of bonds required by the Joint Venture in connection with the Contract shall be obtained through _____ broker.
17. Neither party shall assign, pledge, hypothecate, or transfer its interest in the Joint Venture, or any part thereof (including any interest in the funds or property of the Joint Venture) without the prior written consent of the other party.
18. Subject to the provisions of Paragraph 17, this Agreement shall inure to the benefit of and shall be binding upon the respective successors and assigns of the parties hereto.

IN WITNESS WHEREOF, the parties have executed this Agreement effective as of the date first mentioned above.

President

(Title)

Types Of Joint Ventures

The three types of joint ventures are:

- ❑ Those where all participants are disclosed and named in the contract and the bond.
- ❑ Those where some members are disclosed in the contract and bond
- ❑ Those where a separate corporation is formed by the partners to do one or more projects

Following are examples of a joint-venture agreement in which all members are named, a pre-bid silent joint venture agreement, and a final silent joint-venture agreement. They are labeled as Exhibits E, F, and G.

EXHIBIT E
JOINT VENTURE AGREEMENT

This Joint Venture Agreement made and entered into this _____ day of _____, 20____, by and between ABLE CORPORATION, _____, with its principal office and place of business in _____ (hereinafter called "Able") and BAKER COMPANY, _____, with its principal office and place of business in _____ (hereinafter called "Baker"), both of whom collectively are sometimes referred to as the "Joint Venturers,"

WITNESSETH:

WHEREAS, the Joint Venturers submitted a bid to _____ (hereinafter referred to as "Owner") for the construction of Project No. _____ (hereinafter referred to as "Project"); and

WHEREAS, the parties hereto desire that their interest in the services to be rendered and the work to be done under the construction contract and any profits derived therefrom and any liability for losses arising out of the performance thereof be defined by an agreement in writing:

NOW, THEREFORE, said parties hereto hereby constitute themselves as Joint Venturers for the purpose of performing and completing the said construction contract, but not for any other purposes, it being expressly understood that this agreement contemplates only the furnishing and performance of the work, labor, service, materials, plants, equipment, and supplies necessary for the completion of the said construction contract and that the parties are not making any permanent partnership agreement or joint venture agreement to bid for or undertake any contracts other than the said construction contract, and nothing in this agreement shall be construed as a limitation of the powers or rights of any party hereto to carry on its separate business for its sole benefit; except, however, the parties hereto shall cooperate with each other according to the terms and spirit hereof in the performance of the said construction contract.

To carry out the Joint Venture, the parties hereto mutually agree as follows:

1. The work to be performed by the Joint Venture shall consist of the Contract and any change orders or supplemental agreements entered into with the Owner in connection with the aforescribed project, all of which are hereinafter referred to as the "Contract," and shall be performed by the Joint Venture operating under the name of Able-Baker.
2. Each of the parties shall have an undivided interest in the Joint Venture, shall contribute all necessary working capital, and shall participate in its net gains and profits and share in its losses and liabilities in the proportion set opposite its name in the next succeeding sentence. In addition, the interests of the parties hereto in and to the Contract, and in and to any and all property and equipment acquired in connection with the performance thereof (except as hereinafter provided) and in and to any and all moneys which may be derived from the performance thereof, and the obligations and liabilities of each of the parties hereto as between

themselves in connection with the Contract and with respect to any and all liabilities, costs, and expenses in connection therewith, shall be in the following proportions, viz.:

<u>Name</u>	<u>Percentage</u>
Able	50%
Baker	50%

Each party shall have an equal voice in the determination of any matter involving the business of the Joint Venture until and unless Paragraph 21 hereof should be applicable.

3. Each party does hereby agree to indemnify the other against any loss or liability exceeding the proportions hereinabove stated by reason of any payments required to be made in and about the performance of the Contract.
4. In order to facilitate the handling of all matters and questions in connection with the performance of the Contract by the parties hereto an Administrative Committee shall be formed and each of the parties shall appoint the following representatives (herein called "designees" and "alternates") to act for it in all such matters with full and complete authority on its behalf in relation to any matters or things in connection with, arising out of, or relative to this Joint Venture, and to act for and bind the respective parties appointing such designees to any and all matters or things involving the performance of the Contract:

Able appoints _____ as its designee and
_____ as its alternate.

Baker appoints _____ as its designee and
_____ as its alternate.

The aforesaid members of the Administrative Committee and their alternates have been designated by the Joint Venturers to act for them with full authority in any matter or thing in connection with or relating to the Contract, including but not limited to the negotiation of contracts; the determination of working funds, materials, plant, and equipment to be supplied; the manner of performance; assignment of work between the Joint Venturers; settlement of disputes with the Owner and with others; changes and modifications in the extent or scope of the work; organization, and personnel. Actions and decisions of the Administrative Committee shall be by unanimous vote and shall as to any and all matters having to do with the Joint Venture, the project, the Contract, or the performance under this Agreement or otherwise, or as to the interpretation of the agreement or as to any claim or dispute thereunder, be final, conclusive, and binding on the Joint Venturers with the same force and effect as if each Joint Venturer had specifically or affirmatively taken such action or decision. The Administrative Committee shall be given such specific powers in addition to the foregoing as those Joint Venturers may from time to time delegate and they shall also have the power to delegate to such person or persons as they may determine such of their powers as they deem necessary or convenient in the best

interests of the parties hereto necessary or desirable, each of the parties hereto shall execute and deliver to their respective designees such powers of attorney as may be required to enable them to properly perform the duties entrusted to them. It is understood and agreed that none of the parties hereto nor any of the designees or alternates shall have the power to borrow moneys for, in the name of, or to pledge the credit of, the other party to this agreement or on their joint credit.

5. In the event that either member of the Administrative Committee shall be temporarily incapacitated or temporarily not available to act, the alternate for such member hereinbefore provided for shall act for such member during such period or periods of temporary incapacity or no availability. If either member of the Administrative Committee shall die or become permanently incapacitated or unavailable to act, then a successor for such member shall be named by the Joint Venturer who appointed such member, and pending the appointment of such successor, the alternate for the member so dying or being permanently incapacitated or unavailable to act shall act as such member. In the event of the temporary incapacity or nonavailability, or death or permanent incapacity or nonavailability of any alternate, the Joint Venturer which appointed such alternate shall appoint a successor alternate either temporarily or permanently, as may be necessary. Any successor member or alternate appointed as hereinabove provided shall have every power to act hereunder that was possessed by his predecessor under this Agreement. Either party at any time and from time to time may change and notification of the appointment to the other party as aforesaid, each party shall be bound hereunder in the same manner and with the same effect as if such action had been taken or decision made by authority of its proper officers thereunto duly authorized by its board of directors.
6. Meetings of the members of the Administrative Committee for the transaction of the business of the Joint Venture may be called at such time and such place, subject to reasonable notice, by either Joint Venturer or by any member of the Administrative Committee as may be considered necessary or desirable.
7. The Administrative Committee shall appoint a Project Manager who shall, under the direction, control, and authority of the Administrative Committee, (a) be responsible for the direction and management of the work in accordance with policies and procedures established by the Administrative Committee; (b) coordinate the work; and (c) be responsible for necessary contracts with the Owner and its authorized representatives.
8. The Joint Venturers shall furnish such parts of their respective organizations and personnel for the performance of the Contract as may be requested by the Administrative Committee, and each Joint Venturer further expressly agrees that it shall contribute and make available for the Joint Venture, as far as is reasonably practical for the performance of the Contract, the utmost skill, experience, and knowledge of their respective organizations.
9. A joint bank account or accounts shall be opened in such bank or banks under such description or descriptions as the Joint Venturers may determine, in which all funds advanced by the parties hereto for the performance of the said construction contract and all moneys received from the

Owner and from others in connection with such performance shall be deposited. Said sums may be withdrawn by check, draft, or other instrument in such form and with such signatures as the parties hereto may from time to time direct.

10. Within ten days from the execution of this Agreement, each of the parties hereto shall advance and pay into said account or accounts for use in the performance of the construction contract, the initial sum of \$ _____. The need for working capital additional to the working capital to be provided as aforesaid shall be determined from time to time by the designees hereinbefore designated in Paragraph 4. Within ten days after such determination by the designees, each party shall pay into such bank account or accounts its proportionate share, in accordance with Paragraph 2, of any needed additional working capital, unless the designees shall determine that such additional working capital is required before expiration of said ten days, in which event it shall be so paid into said bank account or accounts at the time that it is so determined by the designees.
11. In the event either party hereto is unable or fails or neglects to advance or contribute its proportionate share of the working capital required in the performance of the construction contract, the other party may, but need not, advance such deficiency or any part thereof, and the party so advancing such deficiency shall receive interest on such excess funds at a rate which is two percent (2%) per annum higher than such advancing party can borrow such sum. Such advance shall bear interest from the date of advancement to the date of repayment, and such excess funds shall be repaid in full with such interest from the said bank account or accounts out of the first moneys thereafter received from the Owner or from others. The interest so paid shall be deducted from the funds otherwise due the party failing to contribute its proportionate part of the working capital.
12. Except as provided in Paragraph 11 for the repayment of excess funds advanced by one party, no part of any advances deposited in said bank account or accounts shall be returned to any of the parties and no distribution of profits shall be made prior to the completion of the Project except as may otherwise be mutually agreed upon in writing by the parties hereto. On completion of the Project, all working capital advanced shall be repaid to the party or parties advancing the same prior to the distribution of any profits as hereinafter provided.
13. The business of the Joint Venture shall be conducted and its property and effects held solely and exclusively in the joint names of both parties or in the joined name of Able-Baker, A Joint Venture.
14. Cost of construction shall consist of the costs of all subcontracts, labor, material, services, supplies, plant and equipment purchased or rented, bonds, insurance, taxes on labor and material, property taxes on equipment, permits, customs, imposts, duties, legal fees, accounting fees, liabilities and losses not covered or compensated by insurance or otherwise, and all expenses and obligations incurred or suffered in and about the performance of said Project of a nature under sound accounting practices properly chargeable as a cost of the performance of the Project. Said costs shall not include any charges against the Joint Venture for any overhead expenses or charges of the main or branch offices of the parties hereto or for the time which

may be expended in connection with the work by any of the parties hereto or their officers or employees, unless assigned to this Project, and except as may be approved by the designees. Travel expenses and subsistence during travel reasonably incurred in the performance or interest of the work under the Contract shall be treated as a part of the cost of the Project and shall be paid with Joint Venture funds.

15. The Joint Venture shall carry adequate public liability, property damage, and workers' compensation insurance, as well as any other insurance that may be required or advisable from time to time, so as to adequately protect the parties hereto and hold them harmless from any accident or claims which may arise in the course of the performance of the Contract, the cost of which insurance attributable to the Joint Venture shall be chargeable thereto. Fidelity bond coverage in amounts and form satisfactory to the designees shall be maintained on such persons directly connected with performance of the Contract as the designees may require, and all such fidelity bond premiums shall be part of the construction cost. All such insurance and bonds that may from time to time be carried shall be obtained through the respective brokers of each of the parties hereto in such manner so that such brokers shall receive equally the benefit of brokerage commissions for the placement of any such insurance or bond.
16. Separate books of account for the Joint Venture shall be kept and maintained by such personnel and in such office or offices as the Administrative Committee may determine pursuant to the methods prescribed by the Administrative Committee for the entry of all accounts in connection with the Contract. All books of account, records, vouchers, contracts, and data of any character relating to the performance of the Contract shall be subject to examination by either Joint Venturer at all times. The Administrative Committee shall prescribe methods of accounting in all matters relating to the affairs of the Joint Venture and the performance of the Contract. The books of account of the Joint Venture may be audited from time to time by an independent auditor selected by the Administrative Committee, the cost of any such audit to be paid from the funds of the Joint Venture. Periodic audits, upon the request of either party hereto, will include comparison between the items of cost and the items set up in the estimate of the cost. Upon completion of the Contract, a complete and final cost and true and correct accounting shall be had of all expenses and all accounts, vouchers, records, and data relating to the Contract and Joint Venture, and to the extent that any such records must be kept subsequent to the completion of the Contract and liquidation of the Joint Venture, pursuant to the provisions of law or by direction of the parties, the same shall be kept at such place or places as the parties hereto from time to time may determine. The cost of all such audits shall be a part of the construction cost of the Project and to the extent that records must be kept subsequent to the completion of the Contract, the cost thereof shall be borne equally by the parties.
17. Upon completion of the Project, after payment of and provision for all costs and liabilities incurred in the performance of the Contract, including liability admitted or reasonably anticipated on or in relation to claims not secured by insurance, and after provision for such reserves in respect of guarantees and contingencies as the Joint Venture shall deem necessary, and after repayment to each party of the amount(s) which it advanced to the Joint Venture as working capital or otherwise, any funds of the Joint Venture then and thereafter remaining, inclusive or reserves and unexpended balances thereof when determined by the Joint Venture to

be required no longer, shall be distributed to and divided equally among the parties in the proportions set forth in Paragraph 2 hereof.

18. Except as otherwise expressly provided in this Agreement or in the Contract, no Joint Venturer shall be entitled to any compensation other than by participation in the profits and earnings of the Joint Venture as hereinbefore provided for services rendered by it on behalf of the Joint Venture, nor for any part of its or their overhead expense, including salaries of their executives, officers, or employees, except the salaries, if any, allowed by the Owner as reimbursable under the Contract. The salaries of all personnel of the Joint Venture assigned to and performing services for the Joint Venture shall be paid out of the funds of the Joint Venture. Nonreimbursable costs incurred for the benefit of the work or the undertaking shall, subject to the approval of the Administrative Committee, be paid out of Joint Venture funds and be deemed costs of the Contract and Project.
19. It is contemplated that in the performance of the work under the Contact, plant and equipment owned by the parties hereto may be used. Each party agrees to rent to the Joint Venture on terms, if any, established in the Contract, or on terms approved by the Administrative Committee, such of its plant and equipment as is available and suitable for the performance of said work and is requested by the Administrative Committee. The proceeds of such plant and equipment rentals shall belong to and be credited and paid to the Joint Venturer furnishing such plant and equipment, and the other Joint Venturer shall have no interest in such plant and equipment rentals and no responsibility in connection therewith.
20. Upon completion of the Project, the parties, through their respective representatives designated hereunder will secure a bona fide bid for each item or group of items of equipment or tools purchased by the Joint Venture, from one or more reputable equipment dealers, and each of the parties shall have the right to purchase any item or group of items at the highest prices bid therefore by such dealers, provided that neither party without the consent of the other shall be entitled to purchase a greater per centum of such equipment or tools than the percentage of its interest in the Joint Venture. If more than one party shall desire the same item or items of equipment or tools, at a price(s) so determined, and a mutually satisfactory adjustment is not affected by agreement between or among them, then such item or items of equipment or tools, in like manner as items thereof not desired by the parties, shall be disposed of, by sale, for the best price obtainable, to outsiders.
21. In the event of the bankruptcy or insolvency of one of the parties hereto, or should one of the parties hereto commit any act of bankruptcy or take advantage or any bankruptcy, reorganization, composition, or arrangement statute, then notwithstanding anything in this agreement to the contrary, such party (hereinafter referred to as the "insolvent party") from and after said date, and its designee and alternate, shall cease any say or voice in the management of the Project and the Contract, and whenever it is provided in this agreement that the act, consent, or decision of the parties hereto are required, it shall be deemed to mean the act, consent, or decision of the other party hereto, excluding the insolvent party. However, the insolvent party shall remain liable for its share of any of the losses as provided in this agreement and shall be entitled to receive its share of the profits, if any, as provided in this agreement, to be paid at the

time and in the manner as in this agreement provided. Should such insolvency, bankruptcy, or other proceeding of the type above-described cause damage or extra cost to the other party, such damage or extra cost shall be charged against the interest of the insolvent party.

22. The relationship between the Joint Venturers shall be limited to the performance of the Contract under the terms of this agreement, which shall be construed and be deemed to be a Joint Venture for the performance only of the Contract between the Joint Venturers and the Owner. Nothing herein contained shall be construed to constitute the Joint Venturers partners or to constitute either Joint Venturer the general agent of the other Joint Venturer, or in any manner to limit either of the Joint Venturers in the conduct of their respective businesses or activities in the making of other contracts or the performance of other work, or impose any liability except that of the performance of the terms, provisions, and conditions of this Agreement.
23. Neither this Agreement nor any interest of the parties or either of them herein, including interest in any moneys belonging to or which may accrue to the Joint Venture in connection with the Contract or any interest in the joint accounts or in any property of any kind employed or used in connection with the Contract may be assigned, pledged, transferred, or hypothecated except that in the event one of the parties desires to obtain banking accommodations for the purpose of this Agreement and the Contract, such party may, with the prior written consent of the other party, assign, pledge, or hypothecate its rights, title, and interest in and to such moneys as it may be entitled to receive hereunder to the lending institution as security for said banking accommodation.
24. The right of any person, firm, or corporation claiming by, through, or under any party hereto (including but not limiting the same to judgment or other creditors, receivers, trustees, assignees, garnishees, executors, or administrators), to assert any claim against the right, title, and interest of any party hereto, shall be limited solely to the right to claim or receive after completion of the Project and the Contract and after the closing of the accounts of the Joint Venture, the distributive share of such party in the net proceeds payable hereunder, earnings or other avails, and then only subject to the equities and prior rights of the other party as in this Agreement set forth.
25. No claims arising out of, or related to, the operation or conduct of the Joint Venture asserted against one or both of the Joint Venturers by a claimant other than a Joint Venturer shall be settled except with the unanimous consent of the members of the Administrative Committee, if then in existence, or of both the Joint Venturers, provided that the consent of any insolvent Joint Venturer or of any Joint Venturer who shall deny liability to the other Joint Venturer with respect to such claim shall not be required.
26. All questions relative to the execution, validity, interpretation, and performance of this agreement shall be governed by the laws of the state of _____ .
27. This Agreement shall remain in effect only for such length of time as may be necessary to carry out the undertaking and the terms, provisions, and conditions of this Agreement.

28. All notices required to be given or which may be given under any of the provisions of this Agreement by either party hereto to the other shall be given by sending such written notice to the Joint Venturer entitled thereto by mail, addressed to the office of such Joint Venturer as first hereinabove set forth.
29. The foregoing provisions and stipulations of the Agreement shall bind the Joint Venturers and their respective successors and assigns.
30. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original and together shall constitute but a single instrument.

ABLE CORPORATION

By: _____

(Title)

ATTEST:

BAKER CORPORATION

By: _____

(Title)

ATTEST:

EXHIBIT F
PRE-BID SILENT JOINT VENTURE AGREEMENT

This agreement made this ____ day of _____, 20____, by and between _____
(herein called “Contractor”) party of the first part, and _____ (herein called
“Silent Venture”) party of the second part,

WITNESSETH:

WHEREAS, contractor will bid on the Contract for _____, and

WHEREAS, if Contract is awarded to Contractor and Agreement is entered into for its performance by Contractor and the owner, Contractor, and Silent Venture intend to participate in a joint venture for the performance of Contract and as joint venturers to share in the profits or losses thereof, to be jointly and severally liable for its performance and to designate the respective obligations of the parties and authority to control the work or act as agent for each other.

NOW, THEREFORE, in consideration of the premises and the mutual agreements of the parties hereinafter set forth, and conditioned upon the issuance by _____ as Surety, of a Bid or Proposal Bond in connection with said Contract, the parties hereto agree as follows:

1. Contractor shall execute said Bond or Proposal Bond and any Performance and Payment Bonds required in connection with Contract if the same is awarded to and accepted by said Contractor.
2. Notwithstanding anything in the joint venture agreement to the contrary, the parties hereto agreed to be joint venturers and, as such, to be jointly and severally liable for the submission of said bid and the performance of the obligations of said Contract, Bid, or Proposal Bond and to all execute appropriate indemnification agreements indemnifying the Surety to the extent required by the Surety.
3. The parties hereto shall, if Contract is awarded to and accepted by Contractor, be and become joint venturers for the performance of Contract and, as such, shall share in the profits or losses thereof equally, unless otherwise mutually agreed upon between them, shall be jointly and severally liable for its performance, shall designate both the respective obligations of the parties and the authority to control the work or act as agent for each other, and shall execute the Contract Bond Application of Surety and any other documents incident thereto.
4. Upon the execution by Surety of any Bid, Proposal, Performance, or Payment Bonds relating to Contract given by Contractor as Principal to the owner as Obligee, this Agreement may not be cancelled, abrogated, or amended except with the prior written consent of Surety.
5. The parties recognize that Surety, although not a party hereto, is relying on this Agreement in the issuance of any bonds to Contractor and that Surety has a right to enforce the provisions of this Agreement to the same extent as though it were a party hereto. This Agreement shall in all its terms and obligations, in addition to being for the benefit of Surety, be also for the benefit of any

other surety or sureties joining with Surety in executing said bond or bonds, or execution at the request of Surety said bond or bonds, as well as any surety or sureties assuming reinsurance thereupon.

Signed and sealed on this day and year first above written.

Witness or Attest:

Contractor

Silent Venturer

EXHIBIT G
SILENT JOINT VENTURE AGREEMENT

THIS AGREEMENT, made and entered into this _____ day of _____, 20____, by and between _____, herein called "Contractor," First Party, and _____, herein called "Silent Venturer," Second Party.

WITNESSETH:

WHEREAS, _____, as Owner, has signified its decision and intention to award to the Contractor a Contract Agreement of general construction in accordance with drawings and specifications prepared by _____, Architect; and

WHEREAS, Contractor needs to procure a Contract Bond, executed by itself as principal and by a corporate surety as surety, in the penal sum of \$ _____, conditioned in the manner approved by said Owner; and

WHEREAS, Contractor can obtain such a Contract Bond from _____, herein called "Surety Corporation," if and only if Silent Venturer will join it in the application therefore and in the agreements contained in said application; and

WHEREAS, Silent Venturer is willing to execute said application and make said agreements, for the convenience of Contractor and pursuant to the request which Contractor heretofore made of it, only upon and subject to the terms and conditions set forth herein;

NOW, THEREFORE, in consideration of the premises and the covenants set forth herein, IT IS MUTUALLY AGREED:

1. Silent Venturer will join Contractor in the execution of an application for the Surety Corporation for a Contract Bond in the penal sum of \$ _____, referenced in said Contract Agreement and conditions in the manner approved by said Owner, and Silent Venturer will join Contractor in making the agreements contained in said application.
2. If the Surety Corporation shall execute a bond after receiving an application joined in by Silent Venturer as aforesaid, then and in such event covenants and agrees to pay Silent Venturer the sum of \$ _____, and to make and effect such payment in full upon completion of the work called for in said Contract Agreement, by whomsoever performed. Contractor acknowledges that its obligation to pay said sum to Silent Venturer is absolute and shall not be subject to abatement or diminution for any reason or under any circumstances. In addition, Silent Venturer shall receive forty percent (40%) of the profits inuring from the performance of such Contract. Under no circumstances shall Silent Venturer be responsible for any losses incurred by Contractor as a result of or in conjunction with the performance of this Contract.
3. This instrument and Silent Venturer's joinder in said application and the agreements provided for therein are conditioned upon each and all the following covenants, terms, and conditions, which Contractor agrees to perform, keep, and owe at its own sole cost and expense and without cost or expenses to Silent Venturer to-wit:

- a. Contractor will pay the premium(s) on said bonds as soon as the same shall become due;
- b. Contractor covenants and agrees faithfully to perform each and every obligation and punctually to make each and every payment incumbent on it under, by virtue of, or in relation to said Contract Agreement and the work provided for therein, and Contractor will not suffer or permit any default to arise under or in relation to said Contract Agreement or work;
- c. Contractor hereby covenants and agrees faithfully to perform each and every covenant and agreement of the application set forth in the application for said Contract Bond and to observe all the other terms and conditions contained therein;
- d. Subject only to the prior right of the Surety Corporation, Contractor hereby grants to Silent Venturer all and the same rights, privileges, and immunities under, in relation to, or in any manner concerning said Contract Agreement, the work provided for therein, or moneys payable thereunder, as are granted to the Surety Corporation in and by said application;
- e. Without limiting the generality of the foregoing, Contractor hereby covenants and agrees:
 - (1) To establish in such bank(s) as Silent Venturer may designate from time to time, a separate and special bank account, herein called "trust account," and to be identified as such on the records of the bank;
 - (2) To receive all moneys due or to become due under or on account of said Contract Agreement, in trust; to deposit such moneys, as and when received, in said trust account(s), and not to permit any moneys to be withdrawn from any such account except in the manner and for a purpose hereinafter provided; and
 - (3) That in the establishment of each such trust account it shall be provided that until the arrangement shall be terminated upon the written consent of Silent Venturer delivered to the bank, no moneys may be withdrawn from the respective account except upon joint signature of an individual designated from time to time by Contractor and an individual designated from time to time by Silent Venturer or upon sole signature of such person(s) as Silent Venturer alone may designate from time to time under and pursuant to Paragraph 8 hereof.
- f. Contractor shall pay promptly, as the same become due, all obligations which it or any member or representative thereof did or may incur in connection with said Contract Agreement or prosecution of the work provided for therein, including the premium for said Contract Bond and all items of every character and description covered by or within the scope of said Contract Bond;
- g. As soon as practicable after a progress payment received under said Contract Agreement shall be deposited in a trust account so established, Contractor shall exhibit to Silent Venturer proof that it paid for all items covered by said Contract Bond in respect of the

portion of the work by said progress payment, whereupon Contractor shall be entitled to reimbursement from said trust account, for the amounts which it expended to pay for such items, up to but not in excess of the lesser of (1) eighty-five percent (85%) of the estimate covered by said progress payment or (2) the balance then on deposit in said trust account, such reimbursement to be by check on said trust account signed as herein provided.

4. If and to the extent that payments, if any, accruing to Contractor under Contract Agreement or hereunder shall not suffice to pay all bills and expenses incurred in the prosecution of said work, as the same accrue and become due, Contractor shall supply any deficiency forthwith.
5. Silent Venturer shall have no responsibility upon any promise or undertaking of Contractor, and Contractor shall have no right or authority to pledge or involve the credit or financial responsibility of Silent Venturer in any way or for any amount.
6. Silent Venturer shall have no duty or responsibility to enforce compliance with the provisions hereof, and may waive any such provision, for as long as it shall elect, without waiving or otherwise affecting its right to insist upon compliance and precise performance in accordance with the tenor hereof.
7. Silent Venturer's rights and privileges herein are intended to be exercised from the date hereof and are not dependent on any default of Contractor under said Contract Agreement, application for Contract Bond, or other instrument.
8. If and at any time that Silent Venturer shall be of the opinion that Contractor shall have failed to perform or observe any covenant, agreement, condition, or restriction contained in said Contract Agreement or herein, Silent Venturer shall have the right:
 - a. To give notice of such opinion to the bank(s) in which any such trust account(s) shall be maintained at the time and on so doing, the authority of Contractor to sign or to designate a representative to sign checks for withdrawal of funds therefrom, jointly with Silent Venturer, shall be terminated instanter at the election of Silent Venturer, and said bank(s) thereafter shall honor checks for the withdrawal of funds from such trust account(s) when and only when signed solely by such person(s) as Silent Venturer alone may designate in writing form time to time, and
 - b. In addition to other rights which Contractor has, to have Contractor removed from the job site and place a contractor of Silent Venturer's selection as completing contractor, and Contractor shall forfeit all rights to any proceeds and shall immediately reimburse Silent Venturer for any losses incurred.
9. Although this arrangement may be styled or considered for certain purposes as a joint venture, it is specifically understood and agreed that Contractor shall perform all work under the Contract, provide all men, equipment, materials, and supplies necessary to complete such work, and do everything else necessary to complete such work in strict accord with the Contract, and Silent

Venturer will have no obligation to do anything in connection with the Contract except to join in the application for the Contract Bond and other documents incident thereto.

10. The provisions hereof shall bind the parties hereto and their respective successors and assigns.

IN WITNESS WHEREOF, the parties have executed this agreement in duplicate on the date and year first above mentioned.

Contractor

Silent Venturer

Bonding Capacity For The Joint Venture

Bond capacity is going to be determined by the combined impact of the joint-venture partners on the normal underwriting considerations of the bonding company. The financial strength, the partners' ability to perform the work, and, of course, the surety's satisfaction that all participants are of good character are basic to the process of analyzing the joint venture. As mentioned in the introduction to this chapter, specialized knowledge in estimating, geographic areas, and unique people resources, and the surety's belief that these qualifications can be brought to bear by the partners in turning a profit also determine whether or not bond capacity will be granted.

Potential joint-venture partners should be careful to note that, in analyzing the capacity of the joint-venture, the surety does not simply combine balance-sheet numbers, the number of estimating and supervisory personnel, and the largest lump-sum contracts each partner has completed to date. Key to the surety's analysis is the determination that each partner has the ability to perform the contract, though current circumstances make a joint venture more plausible. For example, Contractor A may be finishing a project where key supervision is still needed, though estimating staff is free to bid other work. Contractor A's supervisory and estimating staff have a high degree of knowledge in what we will describe as the down-state region. Contractor B also has an estimating staff that engages in direct project supervision, but has limited knowledge of the down-state area. Contractors A and B get together to estimate a project where both may have qualified in their own right. As a team, they overcome the surety's concern about available supervisory forces (on the part of Contractor A) and knowledge of the down-state area (on the part of Contractor B).

It is difficult, however, to pin down the bond capacity of a joint venture (in terms of combined financial strength and project size.) Roughly, the same ratios apply to joint ventures and individual contracts. However, joint ventures can often overcome the surety underwriter's concerns about project contingencies that would make it impossible for one of the participants to qualify individually.

Equity developed through a joint venture should be properly carried on the participants' balance sheets and can have an effect on a surety underwriter's evaluation of a contractor's financial strength.

Insuring the Joint Venture

Although the joint venture may not be structured to accommodate anything more than one project, it is considered a new and distinct

legal entity. Care must be taken to insure this entity properly. Proper insurance for the joint venture involves two phases: course of construction and completed operations.

Two approaches can be used to insure the joint venture:

- ❑ Add it as an insured under one or all of the participants' general liability policies.
- ❑ Purchase a separate general liability policy designed to cover only the joint venture.

The first approach described is the most common and often the most cost-effective approach.

Cosuretyship

A discussion of cosurety is appropriate at this point, not because the joint venture partners need to be concerned about the terms of a cosurety agreement between the bonding companies, but because an exchange of underwriting information between the perspective cosureties is customary in the joint venture. While this underwriting information is given the same degree of respect for confidentiality the participants should have come to expect from their agents and underwriters, an exchange of information and the scrutiny of a third-party is in store.

Cosurety is an arrangement where two or more sureties agree to become coguarantors on a bond. The limit of liability under the bond for the cosureties is limited to their percentage of participation. In most cases where there are two sureties, this will be a 50/50 split.

In the event of a default on the part of the joint venture, each surety will participate in making the owner whole to the extent of their respective percentage of participation. For example, the contract price of a project is \$500,000 and the joint venture is found in default, with the amount of the loss being \$200,000. Each surety, assuming the cosurety arrangement was 50/50, will pay \$100,000 in order to compensate the owner.

Where cosuretyship is involved, rating the bond is a simple process. Bond rates are almost always based upon the full value of the contract price, and this cost is essentially borne by the owner of the project. When the joint venture participants have different bond rates, each participant will figure the cost of the bond for one hundred percent of the contract price.

That figure will be multiplied by the percentage of participation of the contractors' sureties in order to calculate their share of the bond cost which, when added to the bond costs of the other participants in the joint venture, is then passed on to the owner.

Summary

Proposed joint ventures that include careful consideration of the checklist and some variation of the sample agreements provided in this chapter will be perceived as well-thought out by the surety underwriters involved. This is a key obstacle to overcome even before the standard considerations of cash, capacity, and character are put to the test in the underwriter's analysis.

The early involvement of legal counsel in the structure of the proposed joint venture is also important, and by no means should the agreements provided herein be utilized or entered into without the involvement of each contractor's attorney or one attorney assigned to handle the affairs of the joint venture.

Further, the early involvement of each participant's bond and insurance agent is crucial to the smooth handling of the proposed joint venture. While the information gathered by the agents will not differ greatly from a standard case, the added dimension of the time involved in exchanging information, the possible need for meetings on the part of the participants' agents and underwriters, and the logistics involved with job-site visits all point to the need for adequate lead time.

ATTACHMENT 2

Other Resources:

- Joint Ventures In Construction, Third Edition, Richard W. Miller, Published by the National Association of Surety Bond Producers, 5301 Wisconsin Avenue, N.W., Suite 450, Washington, D.C. 20015-2015, (202) 686-3700
- Information regarding OAME or AGC members who can provide joint venture legal counsel is available by contacting May Saephan at OAME, 503-249-7744, by accessing AGC's online membership directory at:
<http://www.agc-oregon.org/MEMBERDIRECTORY/>
or by contacting Cindy Catto, at AGC, 503-685-8329