

JOINT VENTURES

IN CONSTRUCTION

Third Edition

by

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Chapter 1

Introduction

A joint venture has been described in many ways with many elements and purposes. For the purpose of this discussion a joint venture is a combination of two or more persons to carry out a single business enterprise or a series of business enterprises for profit, during which the parties combine such items as property, money, skill and knowledge to achieve such purpose. The amount of money, equipment and property is normally either contributed equally or in specific percentages, but there is no way to measure accurately the skill and knowledge which each party brings to the joint venture.

Substantially the same rules which are applicable to members of a partnership apply to members of a joint venture. One venture member can bind his associates by a contract which is in furtherance of the enterprise or within the scope of activity of the enterprise. Each venturer in a true joint venture is liable for the performance of the entire contract and the payment of all labor, material, equipment and other obligations.

There is no limitation of liability as between the joint venture and the owner and, if there is a default by any member of the joint venture, the remaining financially responsible members of the joint venture are required to complete the job.

Even with the risk that one member of the joint venture may have to satisfy a greater percentage of the loss than originally contemplated, there are certain advantages to a joint venture in construction:

1. It spreads the risk among the members in proportion to each member's interest in the joint venture (although one member may be liable in full to the owner if another member of the joint venture defaults).
2. It combines specialized abilities.
3. It increases the accuracy of bid estimates and permits members to compare estimates with the other members of the joint venture.
4. It permits using a contractor with local knowledge.
5. It increases the ability to bid more projects and thereby spreads bonding capacity in proportion to each member's interest in the joint venture.
6. It enables bids to be submitted on major projects which otherwise one contractor could not do alone.
7. It enables a pooling of talent, resources, equipment, men and financing with the other members of the joint venture.
8. It encourages future business with members of the joint venture.
9. It keeps capital working.
10. It allows a member to increase his area of operation and expertise.

The following sections will discuss some of the ways in which to joint venture, the risks inherent in certain methods, and possible ways to minimize such risks. ■

Checklist of Items To Be Included In a Joint Venture Agreement

Although every joint venture agreement should be specifically prepared for each project, the following are common provisions which should be included or at least considered for inclusion in such agreements:

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.
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 with 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 spelling out the effect of a failure of any member to contribute.
8. A declaration of the participation of the parties and the percentages 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 contribution of equipment to the project.
9. Payment of any fee to the controlling joint venturer or sponsor should be specified whether measured as a share of the profits in excess of that contemplated or as a flat dollar sum.
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, indemnity agreements and the like.
12. Designation of one of the joint venturers as the 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 Certified Public Accountant should be specified.
14. A provision to handle the ramifications of the incapacity, death, bankruptcy, or insolvency of a member must be added to the joint venture agreement.
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. The acquisition of licenses in the name of the joint venture or each venturer as required.
17. The joint venture agreement should clearly define what liabilities are to be insured against by each participant.
18. Items which are to be considered as costs to the joint venture for the purpose of determining profit or loss, and those items which are not reimbursable to members of the joint venture should be detailed.
19. When and how the joint venture is terminated and how such items as guarantees, defects and insurance will be handled after termination.
20. The state under which the provisions of the joint venture agreement will be interpreted should be designated.

It is essential that any joint venture agreement be tailored specifically to the project involved, the needs and desires of each member, the degree and type of participation of the members thereof, the law of the state governing the joint venture, and the performance of the work contemplated.

This checklist and the agreements which follow have been prepared with these factors in mind and should be used merely as guides. ■

Pre-Bidding Joint Venture Agreements

The following forms relate to pre-bidding agreements by a joint venture. Form A is a Declaration of Joint Venture Agreement where the bid is submitted solely in the name of one party and which has as its basic purpose the assurance between each party to the joint venture and assurance to the surety that the surety knows all the parties to the joint venture and that, if the bid is accepted and a contract awarded, each of the parties, as joint venturers, will perform the contract, will execute the application of the surety for any required bonds, and will indemnify the surety as though each was named as a principal in the contract and any bond.

Form B accomplishes the same purpose as the Declaration but it also goes far beyond the declaration by setting forth the basic working relationship between the members of the joint venture and designating such items as the percentage involvement of each member; the sponsor or managing party; the method of handling purchases, rentals, subcontracts and equipment; and the termination of a member's interest on the happening of certain financial difficulties. This form contemplates and so states in Paragraph 14 that a joint venture agreement **more specifically designating the respective interests** of each party will be entered into if the

parties so desire. This agreement does have the distinct advantage of being short and confining itself to the basic understandings, which the parties should resolve prior to submitting a bid, but at the same time the agreement does not overburden the parties with the many minute details of a full scale joint venture agreement. If the parties cannot agree on the items in this agreement, then it is questionable that a joint venture bid should be submitted.

For those who would want to combine a pre-bid agreement with all the terms of a joint venture agreement and thus avoid any after bid negotiating, Form C is suggested as a possible model. It also contains provisions, such as in paragraph 6, which some might consider result in a more "harsh" treatment of a member of the joint venture who does not meet his financial and other obligations. The individual members of each respective joint venture must determine whether they would like to utilize the concepts contained in this agreement or those contained in the joint venture agreement in Chapter 4.

The fourth Pre-Bidding Agreement (Form D) covers a short form of an item joint venture in which each member of the joint venture is solely responsible to perform those bid items designated in the

agreement to be performed by each such member. In a typical item joint venture none of the work is done by the joint venture as such, but instead it is done by the respective members of the joint venture. The profit margin is built into the bid items themselves, and thus the joint venture itself will not be disbursing profits to the venturers. Each venturer will profit or will sustain losses based on how successful each is with the item work allocated to them. Since the venturers are jointly liable to the owner and third parties for all the work, each venturer in Paragraph 8 of the form of item joint venture agrees to indemnify the other from any losses or claims pertaining to the work allocated to each.

In some item joint ventures the work is subcontracted to the respective venturers, but this is a matter of choice among the venturers themselves keeping in mind certain contractual requirements which may require a certain percentage to be done by the joint venture itself.

Form E is a pre-bidding agreement with a disadvantaged party. This form recognizes the need for a full-length joint venture agreement because of the uniqueness of the arrangement. ■

Declaration of Joint Venture Agreement

This Declaration made and entered into this _____ day of _____, 199____ by and between _____ (hereinafter called "Contractor") and _____ (hereinafter called "Venturer") who hereby agree as follows:

1. A bid has been submitted or is to be submitted in the name of Contractor to _____ (hereinafter called "Owner") for construction of _____.

Such bid is for and on behalf of said Contractor and Venturer 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 Contractor alone.

2. If the bid of Contractor 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. If a bid bond or 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 and indemnification agreement of the surety providing such bond(s), 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(s).

4. An original executed copy of this Declaration shall be furnished to said surety by the joint venturers, who agree that its terms and obligations constitute one of the inducements to said surety to provide said bond(s).

5. This Declaration 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(s) as well as any surety or sureties assuming reinsurance thereupon.

In Witness Whereof, the parties have executed this Declaration this _____ day of _____, 19____.

Signed _____

Short Form Pre-Bidding Agreement

This Pre-bidding Agreement entered into as of this _____ day of _____, 199____ by and between the following parties: _____, _____, and _____.

_____ %
_____ %
_____ %
_____ %

WITNESSETH:

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

Whereas, the parties each hereby certify and represent to each other their ability to provide their respective share of bonding capacity, finances, personnel, equipment and supervision to complete the work 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 agreed between the parties hereto as follows:

1. They will jointly prepare a bid to be submitted to the Owner for a contract for the Work.
2. The bid shall be submitted in the names of the undersigned as joint venturers and should a contract for said Work be obtained as a result of such bid, such contract 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 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 shall be as follows:

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 portion 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 a 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 is 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. _____ shall be the Managing Party of the joint venture, 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. The undersigned shall, if necessary or advisable, execute and deliver to the Managing Party or a project manager designated by the Managing Party from time to time a power of attorney sufficiently broad to enable said Managing Party, or the project manager 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 by paragraph 4.
10. Incident to the performance of the contract, the Managing Party, directly or through the project manager acting for it at the time, may 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 therefor by such dealers, but no party without the prior written consent of all other parties shall be entitled to purchase any greater percentage 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 such dealers or other outsiders.

12. In the event that 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 continue in full force and effect.

13. This Pre-bidding Agreement is limited and relates solely to the Work 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 Work, the undersigned, if requested to do so by the Managing Party, will enter into a Joint Venture Agreement more specifically defining their respective interest in, and obligations under, such contract as among themselves, and providing a practical method for their collaboration and cooperation in performing the Work. Such agreement shall incorporate 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.

In Witness Whereof, the parties have executed this Pre-Bidding Agreement this _____ day of _____ 19____ .

By _____

By _____

Long Form Pre-Bidding Agreement

This Agreement, executed this _____ day of _____, 19____, by and between _____, and _____, is made with reference to the following:

Whereas, _____ (hereinafter called "Owner") has invited bids for the construction of _____ (hereinafter called "Project") and has had prepared Plans, Specifications and Addenda thereto, if any (herein called the "Contract"); and

Whereas, the parties hereto intend by this agreement (i) 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 (ii) 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.

NOW THEREFORE, the parties agree as follows:

1. The parties hereby constitute themselves a joint venture (the "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 (a) if the parties do not agree on the terms of the bid, (b) if the Contract is not awarded to the Joint Venture, (c) 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 engag-

ing 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 between the parties 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 to act, severally for, and on behalf of, the Joint Venture, and each of the parties hereby ratifies and confirms 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 hereof, 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 of 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 the proportion set forth above by reason of any liability incurred or loss sustained in connection with, or arising out of, (i) the performance of the Contract, (ii) any bonds to which the Joint Venture is a party, (iii) any indemnity agreements executed in connection with any such bonds, (iv) any financing arrangements to perform the Contract, and (v) the Joint Venture, generally.

6. The parties from time to time shall determine the amount of working capital required to perform the Contract. 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 of its Proportionate Share when due and if such default shall continue for ten (10) 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 a 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 causes of action arising out of such default and any and all remedies therefor 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, mutually agreed upon by both parties 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 are 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 as to 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 or on such other basis as the parties determine. 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. On 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 certified public accountants. Each such audit shall be performed in a manner which will permit the accountants to express an unqualified accountant's 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 (i) all costs incurred in connection with the performance of the Contract and by the Joint Venture, (ii) all claims not fully covered by insurance, (iii) reserves for all claims made or threatened against the Joint Venture and (iv) 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 (i) the Joint Venture automatically shall terminate, (ii) such party shall have no further voice in the performance of the Contract, (iii) 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 occurred 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 (iv) 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 it, pay all obligations owed by it and distribute its assets.

14. _____ owns the equipment which is described on Exhibit "A" hereto and _____ owns the equipment which is described on Exhibit "B" 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 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 of such equipment that the equipment no longer is needed for use by the Joint Venture. The Joint Venture shall bear the cost of operating the equipment, including payment for fuel, oil and lubricants for the equipment, preventive maintenance of the equipment, tires, damages by careless operation of the equipment and damages by unusual job conditions. The owner shall bear the cost of normal repairs to, and repair parts for, the equipment and of repairing or replacing tires worn or damaged by normal use of the equipment. Each owner of such equipment 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 (i) the portion of the cost of the loss of, or damage to, the equipment which is not reimbursed to the owner of the equipment by its 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. Every month each owner of such equipment shall submit a statement to the Joint Venture for the rental costs associated with using that owner's equipment during the preceding month. Each such statement shall be in such detail as the other owner of such equipment reasonably shall require.

- 15. Neither party without the written consent of the 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 a broker or brokers mutually agreed upon between the parties.
- 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 Pre-Bidding Agreement effective as of the date first mentioned above.

By _____
Its President

By _____
Its President

Pre-Bidding Agreement for an Item Joint Venture

(Example only – must be reformatted for each joint venture)

This Pre-Bidding Agreement entered into as of this ____ day of _____, 19____ by and between ABLE CONSTRUCTION COMPANY (hereinafter “Able”), and BAKER CONSTRUCTION CO. (hereinafter “Baker”).

WITNESSETH:

Whereas, the parties hereto desire to submit a joint bid to The United States of America (hereinafter “USA”), for the construction of _____ (hereinafter “Project”).

NOW THEREFORE, it is hereby agreed between the parties hereto as follows:

1. Baker will prepare the bid on Bid Items 20, 21, 22, 23, 34 and 35 and submit that to Able and Able will prepare the balance of the bid using the bid of Baker and submit the joint bid of both to USA for a contract for the construction of the Project.
2. The bid shall be submitted in the names of the undersigned on the USA form as joint venturers and should a contract for said Project be obtained as a result of such bid, such contract 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 USA.
3. Each party shall execute any and all applications and indemnity agreements required by the surety or sureties on any bonds furnished in connection with the bid or award or performance of any such contract. The premiums for any such bonds shall be divided and paid by each party in the proportion that the cost of the bid items for the work to be done by each party shall bear to the total contract amount.
4. 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.
5. 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 is 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.
6. Each and every obligation created by any such bid or contract, except for Bid Items 20, 21, 22, 23, 34 and 35, shall be the sole obligation of Able. Any profits or gains arising from the performance of the contract, except as to Bid Items 20, 21, 22, 23, 34 and 35, shall belong to Able. In the event of any losses arising from the performance of the contract or any claims on the bonds, except as to Bid Items 20, 21, 22, 23, 34 and 35, Able shall assume and pay all such losses and claims.
7. Each and every obligation created by Bid Items 20, 21, 22, 23, 34, and 35, shall be the sole obligation of Baker. Any profits or gains arising from the performance of Bid Items 20, 21, 22, 23, 34 and 35, shall belong to Baker. In the event of any losses arising from the performance of Bid Items 20, 21, 22, 23, 34 and 35, or on any claims on the bonds as to those six bid items, Baker shall assume and pay all such losses and claims.
8. Able agrees to protect, indemnify and hold Baker harmless in connection with the performance of the Contract and all claims made in connection with the Contract, or on any claims on the bonds except as to

the work in connection with Bid Items 20, 21, 22, 23, 34 and 35, and Baker agrees to protect, indemnify and hold Able harmless with respect to the work covered by Bid Items 20, 21, 22, 23, 34 and 35, or on any claims on the bonds as to those six bid items.

9. Upon being awarded a contract for the above-described work, the undersigned 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.

In Witness Whereof, the parties have executed this Pre-Bidding Agreement in multiple the day and year above written.

ABLE CONSTRUCTION COMPANY

By _____

Its _____

BAKER CONSTRUCTION CO.

By _____

Its _____

Pre-Bid Joint Venture Agreement With a DBE

This Pre-Bid Agreement, made and entered into this ____ day of _____, 199____, by and between _____, (hereinafter called "DBE") and _____ (hereinafter called "Contractor"), both of whom collectively are sometimes referred to as the "Joint Venturers"

WITNESSETH:

WHEREAS, the Joint Venturers are planning to submit a bid as a Joint Venture to _____ (hereinafter referred to as the "Owner") for the construction of a project described as: _____ (hereinafter referred to as the "Project"); and,

WHEREAS, DBE does not have the ability to obtain the necessary bid, payment and performance bonds and does not have sufficient financial capability to handle the financial and supervisory commitments arising from this proposed Joint Venture bid and Contractor on certain terms is willing to provide to DBE the bonds, finances, and certain staff and supervisory assistance; and

WHEREAS, the Joint Venturers desire to enter into this Agreement so as to establish, if the Joint Venture is the low bidder and a contract is awarded to the Joint Venture, their respective interests including what services will be performed and who will do what work under the contract, how the profits derived therefrom and how any liability for losses arising out of the performance thereof shall be divided.

NOW THEREFORE, the parties hereto hereby declare themselves as Joint Venturers for the purpose of submitting a bid to the Owner on the Project and if the Joint Venture is the successful bidder and if a contract is awarded by the Owner to the Joint Venture, then the form of Joint Venture Agreement attached hereto as

Exhibit A and the Financial Consulting Agreement, attached hereto as Exhibit B, shall be utilized and executed by both parties in connection with performing the contract for the Owner and to set out the respective rights, obligations and duties of both parties to the Joint Venture and to each other. It is further understood that if for any reason the Joint Venture Agreement or Financial Assistance Agreement are not signed, then at the option of Contractor either or both Agreements shall be deemed executed and shall be binding on and enforceable by, both parties to the same extent as though they were duly executed.

IN WITNESS WHEREOF, the parties have executed this Pre-Bid Joint Venture Agreement on the day and year above written.

CONTRACTOR: _____

By _____
President (First Party)

Attest:

Secretary

DBE: _____

By _____
President (Second Party)

Attest:

Secretary

Joint Venture in Which All Venturers Are Named in the Contract and the Bond

Joint ventures can be categorized many ways but they normally fall into one of four groupings:

1. A joint venture in which all members of the joint venture are disclosed and are named in the contract and the bond and are responsible for all the work. This is the most common form of joint venture.
2. A silent joint venture in which some but not all members of the joint venture are disclosed and

named in the contract and the bond. Such arrangements are discussed in Chapter 7.

3. An item joint venture which was discussed in Chapter 3.
4. The corporate joint venture in which a separate corporation is formed to perform work on a certain project or projects under one contract or a series of contracts with the members of the joint venture holding stock in the corporation in proportion to their

participation. This method is so rarely used today that there is no further discussion of it in this presentation.

The following is a form of joint venture agreement in which all members are named and share in the profits and losses in proportion to their disclosed ownership in the joint venture. ■

Joint Venture Agreement (All Members Are Disclosed)

This Joint Venture Agreement made and entered into this ____ day of _____, 19____, by and between, _____, with its principal office and place of business in _____, and _____, with its principal office and place of business in _____, both of whom collectively are sometimes referred to as the "Joint Venturers",

WITNESSETH:

WHEREAS, the Joint Venturers submitted a bid and a contract has been awarded by _____ (hereinafter referred to as the "Owner"), for the construction of a Project described as _____

(hereinafter being referred to as the "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 contemplate only the furnishing and performance of the work, labor, service, materials, plant, equipment and supplies necessary for the completion of the construction of the Project 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 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 _____
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 interest 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.:

Name	Percentage
_____	_____ %
_____	_____ %

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 become applicable. Each party does hereby agree to indemnify the other against any loss or liability exceeding the proportions, hereinabove stated, for whatever reason, including any payments required to be made in, and about, the performance of the Contract.

3. 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 the "designees" and "alternates") to act for it in all such matters with full and complete authority in 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 this Joint Venture and the performance of the Contract:

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

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

4. 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, this Joint Venture and 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, as to any and all matters having to do with the Joint Venture, the Project, the Contract, or the performance thereof under this agreement or otherwise, or as to the interpretation of this agreement, or as to any claim or dispute thereunder, such actions and decisions shall be final, inclusive and binding on the Joint Venturers with the same force and effect as if each Venturer has specifically or affirmatively taken such action or decision. The Administrative Committee shall be given such specific powers in addition to the foregoing as the 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. If 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 named shall act for such member during such period or periods of temporary incapacity or non-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 and for such member. In the event of the temporary incapacity or non-availability or death or permanent incapacity or non-availability 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 its designee or alternate by advising the other of such appointment, but until the appointment and notification of the appointment to the other party as aforesaid, each party shall be bound conclusively by the acts and decisions of the designee or alternate previously appointed by it hereunder in the same manner and with the same effect as if such action had been taken or decision made by authority of the proper officers of each party duly authorized by its board of directors.

6. Meetings of the members of the Administrative Committee for the transaction of 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 operate under the direction, control and authority of the Administrative Committee and shall (a) be responsible for the direction and management of the work in accor-

dance with policies and procedures established by the Committee, (b) coordinate the work, and (c) be responsible for necessary contracts with the Owner, its authorized representatives and any others necessary to complete the work under the Contract.

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 practicable for the performance of the Contract, the utmost skill, experience and knowledge of their respective organizations. As much as possible the Administrative Committee shall have all of the above provided equally by each member of the Joint Venture.

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 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. Such funds shall be used solely for this Project.

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 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 3. Within ten days after such determination by the designees each party shall pay into such bank account or accounts its proportionate share, as per Paragraph 2, of any needed additional working capital, unless the designees, shall determine that such

additional working capital is required before the expiration of said ten days, in which event it shall be so paid into said bank account or bank 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 Contract, then 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 the rate at which 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 prior to any sums being paid to the non-advancing member of the Joint Venture. The interest so paid shall be deducted from the funds otherwise due the party who failed 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 coined name of _____.
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, charges, legal fees, accounting fees, liabilities and losses not covered or compensated by insurance or otherwise and all other 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 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 worker's 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 claim 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 the 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 the benefit of brokerage commissions for the placing of any such insurance or bond in the proposition that their respective clients have an interest in the Joint Venture.
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 the 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, shall include a comparison between the items of actual cost and the cost set up in the estimate for each item. Upon completion of the Contract, a complete and final audit 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 and the cost thereof shall be borne equally by the parties. The cost of all such audits shall be a part of the construction cost of the Project.

17. Upon completion of the Project, after payment of, and provision for, all costs and liability 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 of reserves and unexpected balances thereof, when determined by the Joint Venture to be required no longer, shall be distributed to and divided 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.
19. It is contemplated that in the performance of the work under the Contract, 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 percentage 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

effected 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 of 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 alter-nate, shall cease to have 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 as 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 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 desire 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 accommodations.
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 Venturers, the distributive share of such party in the net profits and proceeds payable hereunder, 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 of 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 Contract 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 this 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 a single instrument.

In Witness Whereof, the parties have executed this Joint Venture Agreement in multiple copies on the day and year above written.

Joint Venturer: _____

By _____

Its _____

Attest:

Secretary

Joint Venturer: _____

By _____

Its _____

Attest:

Secretary

Joint Venture With a Disadvantaged Party or a Party Who Is Not Financially Responsible But Who Has an Interest in Excess of Fifty Percent

Various governmental agencies have programs to enable contractors who have no independent bonding capacity to bid on, and perform work on, projects requiring bonds. These programs have necessarily resulted in arrangements, some of which have taken the form of joint ventures, being formed to provide bonding and financial capabilities to these disadvantaged companies. Under these various governmental programs, the minority or economically disadvantaged contractor must have at least 51% of the joint venture interest. The standard form of joint venture agreement set forth previously, as well as the silent joint venture agreement, are not applicable under such circumstances and should not be used.

As will be discussed in the next chapter, although the protection which might be accorded to the financially responsible member of such a joint venture is similar to the protection that should exist in certain types of a silent joint venture, this is not and should not be a silent joint venture arrangement, and that form of an agreement will not suffice.

The government has different forms of programs. Some programs involve disadvantaged persons who can be classified in many instances as minorities such as females. These can be in the form of goals to be met and the government in certain instances will allow non-minorities and non-females to assist such companies in many ways. Other programs, such as the 8(a) set-aside have much stricter rules which do

not allow as much assistance.

In an arrangement with a disadvantaged party, it is extremely important that the party who has less than 50%, but is the only financially responsible party, be in a position to take any tax losses. In view of the fact that in this form of an agreement the party designated as the Disadvantaged Contractor normally does not have the financial capability to perform the contract and, in many instances, it thus is fruitless to require such party to bear any percentage of the loss. Also, in order to have a joint venture approved in many areas, it sometimes is significant to the approving agency that the party that does not have the financial capability is not going to be required to bear any of the loss. Since, as a practical matter, the responsible party is going to have to bear the loss in any event, the agreement might as well specify this.

In view of the fact that the financially responsible party, whom the form of agreement set forth below has designated as Investor, is responsible for all of the losses on the project, an administrative committee should be appointed to run the project in order to achieve control for Investor. If the administrative committee is unable to agree on any matter, then all decisions which should have been made by the administrative committee on such matter will be made "by the Project Manager, whose decision will be binding upon the parties." The agreement could also provide that, instead of the decision being made

by the project manager, the decision could be made by the Investor who is the only financially responsible party.

In order to permit the financially responsible party to control the project, such party must also control the project manager. Since the project manager has critical responsibilities, the second paragraph of paragraph 10 provides that "If the Administrative Committee is unable to agree on the Project Manager or if the employee designated to act as Project Manager shall fail, refuse, or be unable for a period of 30 days to fully and completely perform the duties and obligations of the Project Manager, then Investor, has the absolute and sole right to designate the Project Manager and any successor to said Project Manager until all the obligations of the Joint Venture are completed and satisfied, or until any loans or other financial commitments of Investor are concluded and satisfied in full, or until the obligations of the Joint Venture and Investor on the Bonds and related Indemnity Agreements posted in connection with the Contract are released, whichever is later."

Such control is not permitted under a Section 8(a) arrangement.

Many times the parties recognize that the disadvantaged party needs financial and management assistance beyond a normal joint venture agreement. A Financial and Management Assistance Agreement has been prepared to set out this type of arrangement. ■

Joint Venture Agreement With a Disadvantaged Party

This Joint Venture Agreement made and entered into this ___ day of _____, 199___, by and between _____ (hereinafter called "Investor") with its principal office and place of business in _____ and _____, (hereinafter called "DBE") with its principal office and place of business in _____, both of whom collectively are sometimes referred to as the "Joint Venturers"

WITNESSETH:

WHEREAS, a contract has been awarded to the Joint Venturers by _____ (hereinafter referred to as the "Owner"), for the construction of a Project described as _____ (hereinafter referred to as the "Project"); and

WHEREAS, DBE did not have the capability to obtain the necessary bid bond and does not have the capability to obtain the necessary payment and performance bonds and does not have sufficient financial ability to handle the financial, supervisory and managerial commitments arising from this Contract; and

WHEREAS, Investor on certain terms is willing to provide the bonds and financial assistance; and,

WHEREAS, the parties desire that their respective interests and the service to be rendered by each and the work to be done under the 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, Investor and DBE hereby con-

stitute themselves as Joint Venturers for the purpose of performing and completing the Contract as herein provided, but for no other purposes. It is expressly understood that this agreement contemplates only the furnishing and performance of the work, labor, services, materials, plant, equipment and supplies necessary for the completion of the Contract and that the parties are not making any permanent partnership or joint venture agreement to bid on, or undertake any contracts other than the Contract. 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 Contract. To carry out the Joint Venture Investor and DBE 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 Project, all of which are hereinafter referred to as the "Contract" and shall be performed by the Joint Venture operating under the name of _____.
2. All necessary working capital shall be contributed by Investor as and when Investor deems such funds are necessary.
3. Each of the parties shall have an undivided interest in the Joint Venture, and shall participate in its net gains and profits and share in its losses and liabilities in the proportion set opposite the name of each and the interests of the parties in the Contract, 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 and with respect to any and all liabilities, costs and expenses in connection with the Contract, shall be in the following proportions, viz.:

NAME	PERCENTAGE OF PROFIT	PERCENTAGE OF LOSS
DBE	51%	0%
Investor	49%	100%

4. 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 coined name of the Joint Venture.
5. All moneys received from the Owner and from others in connection with the performance of the Contract shall be deposited in the Joint Venturers' bank account. On completion of the Project, any working capital advanced by Investor shall be repaid to Investor prior to the distribution of any profits as hereinafter provided.
6. 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 the "designees" and "alternates") to act for it in all such matters with full and complete authority in 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 of things involving the performance of the Contract. DBE appoints _____
 _____ as its designee and

 _____ as its alternate. Investor 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 thereof 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 Venturer had specifically or affirmatively taken such action or decision.

7. The Administrative Committee shall be given such specific powers in addition to the foregoing as the Joint Venturers may from time to time unanimously delegate and they shall also have the power to delegate to such person or persons as they may unanimously determine such of their powers as they deem necessary or convenient in the best interests of the parties hereto. If 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.
8. In the event that either member of the Administrative Committee shall be temporarily incapacitated or temporarily not available to act or if either member of the Administrative Committee

shall die or become permanently incapacitated or unavailable to act, and if that Joint Venturer does not want the alternate to fulfill the position of designee, then a successor for such member shall be named by the Joint Venturer who appointed such member. In the event of the temporary incapacity or non-availability or death or permanent incapacity or non-availability 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 its designee or alternate by advising the other of such appointment, but until the appointment and notification of the appointment to the other party as aforesaid, each party shall be bound conclusively by the acts and decisions of the designee or alternate previously appointed by it 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.

9. The Administrative Committee shall appoint a Project Manager to administer the work on the Project whose duties and responsibilities shall include:
 - (a) the supervision and coordination of the work in accordance with the terms and conditions of the Contract;
 - (b) the general direction and supervision of the Contract to be performed directly by the Joint Venturer;
 - (c) the establishment and operation of the administrative functions of the Joint Venture such as payroll;
 - (d) the power in the name of the parties to negotiate, execute and deliver purchase orders, rental agreements, subcontracts and other agreements; and

- (e) the employment and discharge of all supervisory, skilled and unskilled employees;
- (f) representation of the Joint Venture in matters relating to labor;
- (g) the submission, certification and appropriate documentation of all vouchers and payment requests to the Owner for payments due the Joint Venture;
- (h) the power to do everything the Investor may deem necessary to carry out and complete the Contract.

10. If the Administrative Committee is unable to agree on the Project Manager or if the employee designated to act as Project Manager shall fail, refuse, or be unable for a period of 30 days to fully and completely perform the duties and obligations of the Project Manager, then Investor, has the absolute and sole right to designate the Project Manager and any successor to said Project Manager until all the obligations of the Joint Venture are completed and satisfied, or until any loans or other financial commitments of Investor are concluded and satisfied in full, or until the obligations of the Joint Venture and Investor on the Bonds and related Indemnity Agreements posted in connection with the Contract are released, whichever is later.
11. 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.
12. A Joint Venture office shall be established at the office of Investor, until the financial commitments of the Joint Venture are concluded, where all accounting, payroll, general office procedures and all other Joint Venture books and records will be located and handled.
13. The working capital and general funds of the Joint Venture shall be deposited in one or more general

checking accounts of the Joint Venture.

Withdrawals from such general accounts shall be made upon the joint signatures of the Designees or by any two persons from time to time mutually agreed upon by the respective Designees. In addition, there will be established by mutual agreement of the parties one or more payroll and tax or other accounts in the bank as designated or in such other bank or banks and subject to withdrawal upon the sole joint signatures of the Designees or by any two persons from time to time mutually agreed upon by the respective Designees.

14. Irrespective of anything in this agreement to the contrary, it is specifically understood and agreed that in the event of a disagreement between DBE and Investor, that disagreement or dispute shall be resolved by the Project Manager whose decision shall be binding upon the parties and if the Designees cannot resolve payment of any sums then the Project Manager is authorized on his signature above to endorse any such checks for payments of any statements or bills he believes are valid debts of the Joint Venture.
15. 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 practicable, for the performance of the Contract the utmost skill, experience and knowledge of their respective organizations. Such personnel shall be provided on as equal a basis by each party as possible.
16. In addition to the other items set forth herein, cost of the Contract shall consist of the costs of all sub-contracts, labor, material, services, supplies, plant and equipment purchased or rented, bonds, insurance, taxes on labor and material, property taxes on equipment, permits, customs, imports, duties, charges, legal fees, accounting fees, liabilities and losses not covered or compensated by insurance or

otherwise and all other 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.

17. The Joint Venture shall carry adequate public liability, property damage and worker's 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 adequately hold them harmless from any accident or claim 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 cost of the Contract. All such insurance and bonds that may from time to time be carried shall be obtained through the insurance agency for Investor and the designees on the Administrative Committee can determine how the brokerage commissions will be divided, if at all, between the insurance agency for the DBE and the insurance agency for the Investor if those are not the same agency.
18. Except as otherwise expressly agreed between the Joint Venturers, 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.

19. The Administrative Committee shall prescribe the 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, shall include comparison between the items of actual cost and the items set up in the estimate of the cost. Upon completion of the Contract, a complete and final audit 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. The cost of all such audits shall be a part of the Contract of the Project and to the extent that records must be kept subsequent to the completion of the Contract, pursuant to the provisions of law, the same shall be kept at such place or places as the designees may from time to time determine and the cost hereof shall be borne equally by the parties.
20. Upon completion and satisfaction of all obligations of the Joint Venture, including all work in connection with the Project, upon satisfaction in full of all loans and other financial commitments of Investor in connection with the Project and Contract, upon release of all obligations of the Joint Venture and Investor on the Bonds and related indemnity agreements posted in connection with the Contract, after payment of and provision for all costs and liability 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 Project Manager shall deem necessary, and after repayment to any party of the amount(s) it advanced to the Joint Venture as working capital or otherwise, any funds of the Joint Venture then and thereafter remaining, inclusive of reserves and unexpected balances thereof, when determined by the Project Manager to be no longer required, shall be distributed to, and divided among, the parties in the proportions set forth in Paragraph 3 hereof.
21. It is contemplated that in the performance of the work under the Contract, 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 as 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, equipment, and equipment rentals and no responsibility in connection therewith.
22. Upon completion of the Project, the parties, through their respective representatives designated herein, 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 therefor by such dealers. 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 effected by agreement between or among them, then such item or items or equipment or tools, in like manner as items therefor not desired by the parties, shall be disposed of by sale, for the best price obtainable, to outsiders. The profits from said sale will be divided according to their respective interests in the Joint Venture.
23. 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 of any bankruptcy, reorganization, composition, or arrangement statute, then notwith-

standing 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 to have 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 is 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, 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 caused damage or extra cost to the other party, such damage or extra cost shall be charged against the interest of the insolvent party.

24. 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 designate either Joint Venturer as 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 performance of the terms, provisions and conditions of this agreement.
25. 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, but only with the

prior written consent of the other party first obtained, 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 accommodations.

26. The right of any person, firm, or corporation claiming by, through, or under, any party hereto (including but not limiting the same to judgment 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, after the closing of the accounts of the Joint Venturers, and the satisfaction and release of all loans, obligations, Bonds and related indemnity agreements in accordance with Paragraph 17 hereof, the distributive share of such party in the net proceeds payable hereunder, whether consisting of the return of any contribution made to working funds 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.
27. 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 by both of 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. Notwithstanding anything herein to the contrary, if the Joint Venturers or the members of the Administrative Committee cannot agree on the settlement or resolution of any claims, then such determination of the same will be made by the Project Manager.
28. All questions relative to the execution, validity, interpretation and performance of this agreement shall be governed by the laws of the State of _____.

29. 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 supercedes all prior agreements between the parties. The foregoing provisions and stipulations of this agreement shall bind the Joint Venturers and their respective successors and assigns.

30. 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 at its last known address.

31. This agreement may be executed in any number of counterparts, each of which shall be deemed an original and together shall constitute a single instrument.

IN WITNESS WHEREOF, the parties have executed this Agreement on the day and year above noted.

INVESTOR:

By _____

Its _____

Attest:

Secretary

DBE:

By _____

Its _____

Attest:

Secretary

Financial and Management Assistance Agreement

THIS AGREEMENT, made and entered into this ___ day of _____, 199___, by and between _____, (hereinafter referred to as "Contractor"), First Party, and _____, (hereinafter referred to as "DBE"), Second Party,

WITNESSETH:

WHEREAS, DBE is a minority contractor which does not have the funds and personnel to perform certain supervisory and managerial functions;

WHEREAS, DBE considers it necessary to employ Contractor to perform certain financial, supervising and managerial functions for its own business and for any joint venture entered into with Contractor;

WHEREAS, Contractor is engaged in construction for a number of years and has the personnel and expertise in managing and operating construction operations;

WHEREAS, Contractor is interested in entering into a joint venture arrangement with DBE to assist DBE in running its business;

NOW, THEREFORE, in consideration of the premises and the mutual covenants expressed therein, **IT IS AGREED:**

1. DBE hereby hires and employs Contractor to perform the following services on any project undertaken by DBE in any joint venture with Contractor a) all basic managerial and administrative functions normally performed in the management of a like contracting concern subject to direction from the directors of DBE; b) estimating the work c) obtaining insurance; and d) maintaining all accounting records and performing all accounting services including keeping complete books of account, including payment of all

bills and payroll and any costs, expenses and income of any joint venture between DBE and Contractor shall be recorded therein; e) training employees of DBE to perform such services.

2. DBE does not have anyone on its staff that can satisfactorily perform the services to be performed by Contractor and Contractor shall also try to train others employed by DBE to perform those services with the ultimate goal being to enable DBE to perform these services without assistance by Contractor. Other than in the process of training as herein provided, Contractor shall have a) no authority to direct or in any way control employees of DBE, b) no voice whatsoever in the hiring or firing of employees of DBE, and c) no control whatsoever over the time, manner or wages paid to employees of DBE. Under no circumstances shall Contractor have any responsibility or obligation for compensation due or payable to employees of DBE and any joint venture, taxes and fringes measured by, or in relation to, the amount of such compensation, insurance premiums and any other direct or indirect costs, or otherwise.
3. For the services performed by Contractor under this Agreement, DBE shall pay Contractor \$ _____ per month for each joint venture project of the parties. In addition, Contractor shall be paid by DBE for any employee of Contractor who shall be employed by DBE or any joint venture between DBE and Contractor.
4. The records, books of account and other papers of every character and description pertaining to any joint venture between the parties shall be kept at Contractor's office and shall not be removed therefrom, and shall be open to inspection and audit by DBE during normal business hours after reasonable notice.

5. If either party to this Agreement shall fail to perform as herein provided and shall fail to commence to rectify such default within five (5) days after the other party gives it written notice thereof, then such non-defaulting party may terminate this Agreement by giving the defaulting party notice that the Agreement is terminated. This Agreement, unless terminated as provided in the immediately preceding paragraph, shall continue in force and effect for _____ years from the date hereof and it shall automatically renew itself from year to year thereafter unless at least ninety (90) days prior to the end of any such Agreement year either party shall give the other party written notice that the same shall expire at the end of the Agreement year then in force which shall be deemed to end on _____ of each year during continuance of this Agreement. Notwithstanding anything herein to the contrary, DBE cannot exercise its right not to renew the contract until a) all the work on all joint ventures between DBE and Contractor are completed and accepted and all liabilities and warranties in connection therewith are fully satisfied; b) any loans which Contractor has made to, or for, DBE or has guaranteed for DBE individually or for any joint venture between DBE and Contractor are satisfied and no longer remain unpaid and Contractor is relieved of its obligations thereon, and c) any obligation or exposure on any bonds or indemnification agreements as to which Contractor has acted as an indemnitor remains open, not cancelled or unsatisfied either for DBE or any joint venture between DBE and Contractor.

6. Nothing herein contained shall be considered to constitute the parties hereto as partners nor to constitute any party hereto as the general agent of any other party and nothing in this Agreement shall be construed as a limitation or restriction upon the right and power of either party to carry on its separate business for its sole benefit. The only arrangement between the parties separate from this Agreement would be any joint venture agreements between the parties which are or will be set forth in specific written agreements.

7. This Agreement and all questions relative to the execution, validity, interpretation and performance of this Agreement shall be governed by, and construed in accordance with, the laws of the State of _____ and, if there is any dispute between the parties, then that suit can only be brought and maintained in the _____ Court of _____ County, State of _____ and venue and jurisdiction shall rest solely in said County, and nowhere else.

IN WITNESS WHEREOF, the parties hereto have caused this Financial Assistance Agreement to be executed by their respective officers hereunto duly authorized on the day and year above written.

CONTRACTOR: _____

By _____
President (First Party)

Attest:

Secretary

DBE: _____

By _____
President (Second Party)

Attest:

Secretary

Section 8(a) Arrangements

Agreements for performing Section 8(a) work are covered by the Small Business Act, as amended particularly § 7(j)(10), 15 U.S.C. 636(j)(10) and 13 C.F.R. §124.321, §124.314 and 48 C.F.R. § 9.6. As will be discussed, these arrangements thus are far more restrictive than an arrangement with a disadvantaged party who is not 8(a) certified.

The 8(a) concern shall notify the applicable field office and request approval for any contemplated agreements, arrangements or understandings, regardless of type, that may in any way give an interest to any person, other than those upon whom eligibility was based, in the operation, management or control of the 8(a) concern. These include, but are not limited to, joint venture, management, sponsorship, or training agreements. Joint venture, management and similar agreements between an 8(a) concern and a part owner of the concern are prohibited.

There are specific size limitations so that an 8(a) concern cannot enter into a joint venture with any concern other than one that meets the 8(a) standards except for certain Program Participants owned and controlled by Indian Tribes. An 8(a) concern entering into a joint venture agreement with another concern is considered to be affiliated for size purposes with the other concern with respect to performance of the 8(a) subcontract. As such, the annual receipts or employees of the other concern are included in determining the size of the selected 8(a) concern. The combined annual receipts or employees of the concerns entering into the joint venture must

meet the size standard for the SIC code industry designated for the contract.

A violation of any of the applicable rules or regulations has grim consequences since a violation of any of the required provisions of a joint venture agreement may cause the SBA to direct the 8(a) concern to cancel the agreement or terminate the concern's Program Participation. The following provisions shall be included in all 8(a) joint venture agreements:

1. A provision setting forth the purpose of the joint venture.
2. A provision designating the parties to the joint venture as co-managers.
3. A provision stating that not less than 51 percent of the net profits earned by the joint venture shall be distributed to the 8(a) concern. (The distribution of proceeds shall be based on the after tax net profits of the joint venture).
4. A provision providing for the establishment and administration of a special bank account in the name of the joint venture. This account shall require the signature of all participants to the joint venture or designees for withdrawal purposes. All payments due the joint venture for performance on the 8(a) subcontract shall be deposited in the special account from which all expenses incurred under the subcontract shall be paid.
5. An itemized description of all major equipment, facilities, and

other resources to be furnished by each Participant to the joint venture, with a detailed schedule of cost or value of each.

6. A provision specifying the responsibilities of the parties with regard to contract performance, source of labor and negotiation of the 8(a) contract and any subcontracts to the joint venture.
7. A provision specifying that an approved joint venture agreement may be amended in writing from time to time by the parties, but that all amendments, extensions and modifications to, and deviations from, requirements of the agreement shall be subject to prior approval by the AA/MSB&COD or his/her designee.
8. A provision providing for the establishment of a working capital fund at the onset of contract performance. A provision providing for maintaining and adding to the working capital fund throughout performance of the contract.
9. An employee of the 8(a) concern must be the designated project manager responsible for contract performance.
10. Accounting and other administrative records relating to the joint venture shall be kept in the office of the 8(a) concern, unless approval to keep them elsewhere is granted by the AA/MSB&COD based upon the firm's written request. Upon completion of the contract per-

formed by the joint venture, the final original records shall be retained by the 8(a) concern.

11. Quarterly financial statements showing cumulative contract receipts and expenditures (including salaries of the joint venture's principals) shall be submitted to SBA not later than 45 days after each operating quarter of the joint venture.
12. A project-end profit and loss statement shall be submitted no later than 90 days after completion of the contract including a statement of final profit distribution.

Further requirements of a joint venture arrangement are:

1. All parties to the joint venture must sign such documents as are necessary to obligate themselves to ensure performance of the 8(a) contract. [C.F.R. § 124.321(e)].
2. The joint venture shall provide for continuance of performance

of the contract in case of organizational dissolution or bankruptcy of one of the parties to the joint venture.

3. The joint venture agreement shall specify an arbitrator to settle any dispute that may arise, and shall delineate duties and responsibilities for continuing the performance of the contract while disputes are being resolved.
4. The 8(a) partner to an eligible joint venture, and not the aggregate of all parties to the joint venture, must perform the applicable percentages of work required by [13 C.F.R. §124.314], [13 C.F.R. §124.321(f)].

A Management Agreement is not recommended since it is so restrictive. For example, a Management Agreement cannot transfer actual control of the day-to-day operations of the 8(a) concern to another concern, whether disadvantaged or not, or to an individual(s) other than the individual(s) upon whom 8(a)

Program eligibility is based. Management agreements are intended to provide 8(a) concerns with advice and assistance, not to permit a second person or business entity to actually perform the tasks required under a particular 8(a) award. The management concern cannot perform any services for the 8(a) concern that can be obtained through SBA or at a reasonable cost in the open market. The 8(a) concern shall submit to SBA itemized invoices for services received from the management concern which shall be compared to assure that they conform with the management agreement and approved for payment by the SBA prior to payment by the 8(a) concern.

These arrangements are governed by very specific rules and regulations. A teaming agreement - joint venture which complies with the present regulations is attached. For the ease in considering this, the respective sections of the applicable regulations are listed at the end of various paragraphs. ■

Teaming Agreement

This Teaming Agreement, made and entered into this ____ day of _____, 199____, by and between _____, a _____ corporation, with its principal office and place of business in _____ (hereinafter, "Section 8(a)") and _____, a _____ corporation, with its principal office and place of business in _____ (hereinafter, "Participant") (both Section 8(a) and Participant collectively are sometimes referred to as the "Joint Venturers").

WITNESSETH:

WHEREAS, Section 8(a) is a Minority Business Enterprise, certified by the Small Business Administration under Section 8(a) of the Small Business Act, and

WHEREAS, the Joint Venturers jointly submitted a bid to, and a contract (hereinafter referred to as a "Contract" as more fully defined in Section 1 hereof) has been awarded by _____, (hereinafter referred to as the "Contractor"), for the construction of Project No. _____ (hereinafter referred to as the "Project"); and,

WHEREAS, Section 8(a) does not have the financial capacity to obtain the necessary payment and performance bonds and does not have sufficient experience and funds to handle the financial and managerial commitments arising from the bid and Contract, and Participant on certain terms is willing to obtain such bonds and provide such finances and managerial assistance; and

WHEREAS, the parties hereto desire to form a team arrangement (hereinafter referred to as the "Joint

Venture") in order that their respective interests under the Contract, including services to be rendered, work to be done, profits derived therefrom, and liabilities for losses arising thereunder, be defined by an agreement in writing. (48 C.F.R. §9.6)

NOW, THEREFORE, said parties hereto hereby form a team arrangement and constitute themselves as Joint Venturers for the purpose of performing and completing the Contract, but not for any other purpose, it being expressly understood that this Agreement contemplates only the furnishing and performance of the work, labor, service, materials, plant, equipment and supplies necessary for the completion of the Contract defined herein and that the parties are not making any permanent partnership agreement or joint venture agreement to bid for, or undertake, any contracts other than said 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 all obligations required of the Joint Venture pursuant to the Contract and all change orders and supplemental agreements entered into with the Contractor in connection with the Project. Hereinafter, the term "Contract" shall refer to and include the Contract awarded to the Joint Venture by the Owner with respect to the Project, together with all change orders and supplemental agreements relating thereto. The Joint Venture shall operate under the name of _____ . Each of the parties shall sign such documents as are necessary to obligate themselves to ensure performance of the Contract. 13 C.F.R. §124.321(c)(2).

2. Each of the parties shall have an undivided interest in the Joint Venture 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, all monies which may be derived from the performance thereof, and all 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.:

NAME	PERCENTAGE OF AFTER TAX NET PROFIT	PERCENTAGE OF LOSSES
Section 8(a) Participant	51%	0%
	49%	100%

13 C.F.R. §124.321(c)

3. Each of the parties shall be a co-manager of the Joint Venture and 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 the "Designees" and "Alternates") to act for each respective party in all such matters with full and complete authority in 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 to any and all matters or things involving the performance of the Contract. Section 8(a) hereby appoints _____ as its Designee and _____ as its Alternate. Participant hereby appoints _____ as its Designee and _____ as its Alternate. The aforesaid Designees of the Administrative Committee and their Alternates

have been designated by the Joint Venturers to act for, and on behalf of, the party each one represents with full authority in any matter or thing in connection with or relating to the Contract, including, but not limited to the negotiation and execution of contracts (including but not limited to contracts for labor and materials from the parties to this Agreement and other subcontractors), the determination of working funds, materials, plant and equipment to be supplied, the manner of performance, the assignment of work between the Joint Venturers, the settlement of disputes with the Contractor and with others, changes and modifications in the extent or scope of the work, and the organization of the Joint Venture and its 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, the performance thereof under this Agreement or otherwise, the interpretation of this Agreement, and all claims and disputes hereunder, 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 the Joint Venturers may from time to time unanimously delegate. The Administrative Committee shall also have the power to delegate to one or more persons such of its powers as it deems necessary or convenient in the best interests of the parties hereto. If 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 their Designees or Alternates shall have the power to borrow money for, in the name of, or to pledge the credit of, the other party to this Agreement, either individually or on joint credit with such a party. 13 C.F.R. §124.321(c).

4. In the event that either Designee shall die, become permanently or temporarily incapacitated, or become permanently or temporarily unable or unavailable to act, and if that Designee's respective party does not want the Alternate to fulfill the position of Designee, then a successor for such Designee shall be named by the Joint Venturer who appointed such Designee. Any such 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 its Designee or Alternate by advising the other of such appointment, but until the appointment and notification of the appointment to the other party as aforesaid, each party shall be bound conclusively by the acts and decisions of the Designee or Alternate previously appointed by it hereunder in the same manner and with the same effect as if such action had been taken or decision made by authority of that party's officers duly authorized by its board of directors.

5. Meetings of the Administrative Committee for the transaction of the business of the Joint Venture may be called at such time and place, subject to reasonable notice, by either Joint Venturer or by any member of the Administrative Committee as may be considered necessary or desirable.

6. The Administrative Committee shall appoint a Project Manager whose duties and responsibilities shall include:

- (a) the general direction, supervision and coordination of performance under the Contract by the Joint Venturers and the Joint Venture's sub-contractors and suppliers (if any);
- (b) the employment and discharge of all supervisory, skilled and unskilled employees and representation of the Joint Venture in all matters relating to labor;
- (c) the submission and certification of all vouchers, payment requests and other appropriate documentation to the Contractor for payments due

the Joint Venture;

- (d) the establishment and operation of the administrative functions of the Joint Venture, including but not limited to such matters as payroll; and
- (e) the power in the name of the parties to negotiate, execute and deliver purchase orders, rental agreements, subcontracts and other agreements (including but not limited to contracts with the individual Joint Venturers), and to take such steps and otherwise obligate the parties as the Project Manager may deem necessary in connection with performing the obligations of the Contract.

In the event (1) the Administrative Committee is unable to agree on the Project Manager, or (2) the person designated to act as Project Manager shall fail, refuse or be unable for a period of 30 days to fully and completely perform the duties and obligations of the Project Manager, or (3) either Joint Venturer notifies the other in writing that it would like to replace the Project Manager and the members of the Administrative Committee cannot agree on a replacement, then under any of these situations, Participant has the right to designate the Project Manager and all its successors until (a) all the work and obligations of the Joint Venture on the Contract are completed, executed and satisfied; (b) all liabilities and warranties in connection therewith are satisfied; (c) the obligations of the Joint Venture and Participant on the Bonds and related Indemnity Agreements posted in connection with the Contract are released; and (d) all loans guaranteed by Participant for the Joint Venture have been satisfied and paid in full, whichever contingency shall occur last.

7. A Joint Venture office shall be established at the office of Section 8(a) until the Joint Venture's financial commitments are concluded, where all accounting, payroll, general office procedures and all other Joint Venture books and records will be located and handled. Participant will be paid \$ _____ per month for maintaining such book until all such record keeping is no longer

required for maintaining the books and records and assisting and teaching personnel selected by Section 8(a) on how to maintain such books and records on this and other projects. The working capital and general funds of the Joint Venture shall be deposited in a special checking account of the Joint Venture. Withdrawals from such general accounts shall be made upon the joint signatures of the Designees or by any two persons from time to time mutually agreed upon by the respective Designees. In addition, there will be established by mutual agreement of the parties one or more payroll and tax or other accounts in a designated bank or in such other bank or banks, and subject to withdrawal upon the sole joint signatures of the Designees or by any two persons from time to time mutually agreed upon by the respective Designees. If the Designees or the persons selected by the Designees cannot agree on whether to pay a certain bill or indebtedness, then the Project Manager has the authority to endorse any such check and make any such withdrawal and on the failure of the Project Manager to do so, then the Arbitrator has the authority to do so. 13 C.F.R. §124.321(c)

8. Notwithstanding anything in this Agreement to the contrary, it is specifically understood and agreed that in the event of a disagreement between Participant and Section 8(a), that disagreement or dispute shall be resolved by _____,

(hereinafter called the "Arbitrator") whose decision shall be binding upon the parties. All work on the Project shall continue during the pendency of any dispute between the parties; and the Arbitrator, in addition to deciding all disputes between the parties, shall delineate the duties and responsibilities of the parties during the pendency of the dispute and prior to its resolution. 13 C.F.R. §124.321(e)

9. 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 on payment terms approved by the Project Manager, and each

Joint Venturer further expressly agrees that it shall contribute and make available for the Joint Venture as far as is reasonably practicable for the performance of the Contract the utmost skill, experience and knowledge of their respective organizations.

10. All monies received from the Contractor and from others in connection with the performance of the Contract shall be deposited in the special bank account in the name of the Joint Venture. 13 C.F.R. §124.321(c)

11. On completion of the Project, any working capital advanced by either Joint Venturer shall be repaid in full to the respective Joint Venturer prior to the distribution of any gains or profits as hereinafter provided.

12. 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 Joint Venture name.

13. The costs of the Contract shall consist of the costs of all subcontracts (including any and all subcontracts with the individual parties to this Agreement), labor, material, services, supplies, plans and equipment purchased or rented, bonds, insurance, taxes on labor and material, property taxes on equipment, permits, customs, imports, duties, charges, legal fees, accounting fees, liabilities and losses not covered or compensated by insurance or otherwise, and all other expenses and obligations incurred or suffered in and about the performance of said Project of a nature that are properly chargeable as a cost of the performance of the Project under sound accounting practices. Said costs shall not include any charges against the Joint Venture for any overhead expenses for the main or branch offices of the parties hereto or any labor or materials supplied by the parties hereto in connection with the Project unless payment for such overhead, materials and labor is expressly approved by the Project Manager or Administrative Committee. 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.

14. The Joint Venture shall carry adequate public liability, property damage and worker's 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 all accidents and claims which may arise in the course of the performance of the Contract. The cost of such insurance attributable to the Joint Venture shall be chargeable thereto. Fidelity bond coverage in amounts and form satisfactory to the Administrative Committee shall be maintained on such persons directly connected with performance of the Contract as the Administrative Committee may require, and all such fidelity bond premiums shall be part of the costs of the Contract. 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 placing of any such insurance or bond.
15. The Administrative Committee shall prescribe the 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 shall include comparison between the items of cost and the items set up in the estimate of the cost. Quarterly financial statements showing cumulative Contract receipts and expenditures (including salaries, if any, of the principals of the Joint Venture) shall be submitted to the SBA not later than forty-five (45) days after each operating quarter of the Joint Venture. A Project-end profit and loss statement shall be submitted no later than ninety (90) days

after completion of the Contract including a statement of final profit distribution. Upon completion of the Contract, a complete and final audit 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. The cost of all such audits shall be deemed a cost of the Contract, and to the extent that records must be kept subsequent to the completion of the Contract, pursuant to the provisions of law, the final original records shall be retained by Section 8(a) at such place or places as the Administrative Committee may from time to time determine and the cost thereof shall be borne equally by the parties. 13 C.F.R. §124.321(e)

16. Upon (a) completion and satisfaction of all obligations of the Joint Venture, (b) completion of all work in connection with the Project, (c) satisfaction in full of all loans and other financial commitments of Participant in connection with the Project and Contract (if any), (d) release of all obligations of the Joint Venture and Participant on the Bonds and related Indemnity Agreements posted in connection with the Contract, (e) payment of, and provision for, all costs and liability incurred in the performance of the Contract (including liability admitted or reasonably anticipated on or in relation to claims not secured by insurance) after provisions for such reserves in respect of guaranties and contingencies as the Project Manager shall deem necessary, and (f) repayment to any party of the amount(s) which such party advanced to the Joint Venture as working capital or otherwise, all funds of the Joint Venture then and thereafter remaining, inclusive of reserves and unexpected balances thereof when determined by the Project Manager to be no longer required, shall be distributed to and divided among the parties in the proportions set forth in Section 2 hereof. 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 Contract.

17. Except as otherwise expressly provided herein or as otherwise agreed between the Joint Venturers, 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 in Section 2 hereof, 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, and the salaries of all personnel of the Joint Venturers assigned to, and performing services for, the Joint Venture, which shall be paid out of the funds of the Joint Venture. Non-reimbursable costs incurred for the benefit of the work or the undertaking shall, subject to the approval of the Administrative Committee, be paid out of the Joint Venture funds and be deemed costs of the Contract and Project. Nothing contained herein shall prevent the parties to this Agreement from being compensated for their overhead, labor, materials and other items or services supplied to the Joint Venture pursuant to (a) subcontracts or purchase orders between the Joint Venture and the respective party, and (b) approvals that are received for such compensation from the Administrative Committee pursuant to Section 13 of this Agreement. All such amounts expended for such overhead, labor, materials and other items or services supplied by the parties to this Agreement shall be charged as "costs" to the Joint Venture under Section 13 hereof and shall not be deemed distributions of any profits as provided in Section 2 hereof.
18. It is contemplated that in the performance of the work under the Contract, 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 as

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. Attached hereto as Exhibit A and made a part hereof is an itemized description of all major equipment, facilities, and other resources to be furnished by each party to the Joint Venture with a detailed schedule of cost or value or rental charge of each. This Exhibit A shall be supplemented as additions thereto are agreed upon between the parties. 13 C.F.R. §124.321(c)

19. Upon completion of the Project, the parties, through their respective members of the Administrative Committee, will secure a bona fide bid from one or more reputable equipment dealers, for each item or group of items of equipment or tools purchased by the Joint Venture. Each of the parties shall have the right to purchase any item or group of items, at the highest prices bid therefor by such dealers. If both Joint Venturers shall desire the same item or items at a price(s) so determined, and a mutually satisfactory adjustment is not effected by agreement between 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 third-parties.
20. 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 be named as debtor in any bankruptcy proceeding, or should either party take advantage of 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 to have any say or voice in the management of the Project and the Contract. Whenever it is provided in this Agreement that the act, consent or decision of the

parties hereto is required, it shall be deemed to mean only the act, consent or decision of the other party hereto who is not the Insolvent Party. However, the Insolvent Party shall remain liable for its share of any of the losses 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 Joint Venturer, such damage or extra cost shall be charged against the interest of the Insolvent Party. 13 C.F.R. §124.321(e)

21. 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 Contractor. 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 performance of the terms, provisions and conditions of this Agreement.
22. Neither this Agreement nor any interest of the parties or either of them herein, including any interest in moneys belonging to or which may accrue to the Joint Venture in connection with the Contract, any interest in the joint accounts, and any interest 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, but only with the prior written consent of the other party first obtained, assign, pledge or hypothecate its rights, title and interest in, and to, such moneys as such party may be entitled to receive hereunder to the lending institution as security for said bank-

ing accommodations.

23. The right of any person, firm or corporation claiming by, through, or under, any party hereto (including but not limiting the same to judgment creditors), 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 Venturers, and the satisfaction and release of all loans, obligations, Bonds and related Indemnity Agreements in accordance with Section 16 hereof, the distributive share of such party in the net proceeds payable hereunder, whether consisting of return of any contribution made to working funds 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.
24. 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 of the Joint Venturers, provided that the consent of any Insolvent Party or of any Joint Venturer who shall deny liability to the other Joint Venturer with respect to such claim shall not be required. Notwithstanding anything herein to the contrary, if the Joint Venturers or the members of the Administrative Committee cannot agree on the settlement or resolution of any claims, then such determination of the same will be made by the Arbitrator.
25. Notwithstanding anything herein to the contrary, it is further agreed that:
 - a) Section 8(a) agrees to protect, defend, indemnify and save harmless Participant from and against any and all losses, costs, claims, expenses, actions, judgments, demands, suits, liens, or obligations whatsoever made against or levied against or collected from such parties, or either

of them, or from or against such Bid Bond and Payment and Performance Bonds arising out of or in any manner resulting from, the Contract, the Project and the performance thereof;

- b) In the event any claims shall be made against the Bid Bond and Payment and Performance Bonds provided hereunder, or in the event of any notice of default issued to Section 8(a) by the Contractor or Contracting Officer. Section 8(a) shall cause such claims to be settled and released and shall cause such default to be remedied and withdrawn within ten (10) days from such notice. If Section 8(a) shall refuse or fail to comply with such notice, then Participant shall have the right to take over on its own to remedy any such claim or default and Section 8(a) agrees to protect, defend, indemnify and hold harmless Participant against, and to reimburse Participant for, all costs and expenses incurred by Participant in connection therewith;
- c) Participant shall at all times have authority to take whatever actions it deems necessary to protect its interests and obligations under the Bid Bond and the Payment and Performance Bonds, and Section 8(a) shall cooperate in a reasonable manner with Participant's attempts to do so. By its signature on this Agreement, Section 8(a) consents to the foregoing provision;
- d) Section 8(a) shall protect, defend, indemnify and save harmless Participant from and against any and all losses, costs, liabilities, actions, suits, claims, judgments, demands or obligations whatsoever brought or asserted against Participant by any person or persons (including without limitation, employees of Section 8(a) or its subcontractors) and arising out of or in any manner associated with the performance of the Contract and caused by or resulting from the negligence of Section 8(a) and its agents employees, subcontractors or suppliers, and

excluding and excepting only the sole negligence of Participant, its agents or employees; and

- e) Section 8(a) shall obtain General Liability and Automobile Liability policies in limits acceptable to Participant and shall cause such policies to be endorsed so as to name Participant as an additional insured in connection with activities performed in connection with the Contract. The insurance provider and terms and provisions of such policies shall be acceptable to, and approved by, Participant.

- 26. All questions relative to the execution, validity, interpretation and performance of this Agreement shall be governed by the laws of the State of _____, and if there is any dispute between the parties, then the parties agree that suit can only be brought and maintained in the _____ of _____ County, _____ and venue and jurisdiction shall rest solely in _____ County, _____ and nowhere else. Any decision by the Arbitrator is subject to being confirmed and can be confirmed just the same as any other decision by an arbitrator or arbitration panel.
- 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 shall be given by sending such written notice by mail addressed to the office of such Joint Venturer as first hereinabove set forth.
- 29. The foregoing provisions and stipulations of this Agreement shall bind the Joint Venturers and their respective successors and assigns; provided, neither party may assign or delegate any of its duties, responsibilities and liabilities hereunder without the prior, written consent of the other.

30. This Agreement may only be amended from time to time by the parties in writing and all such amendments shall be subject to the prior approval by the appropriate personnel of the SBA or the designee thereof. 13 C.F.R. §124.321(c) (Date)

31. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original and together shall constitute a single instrument.

IN WITNESS WHEREOF, the parties hereto have executed this Joint Venture Agreement on the day and year first above written.

SECTION 8(a): _____

By _____

Its _____

Attest:

Secretary

PARTICIPANT: _____

By _____

Its _____

Attest:

Secretary

Silent Joint Venture

In a silent joint venture, one or more parties are named in the contract and bond but there also are one or more parties who are not disclosed. The usage of this arrangement arises under different circumstances, such as:

- (a) one of the members of the joint venture is unable to obtain sufficient bonding or financing, or both, on his own and requests a third party to arrange the bonding or financing, or both, in such a way as not to disclose his dependence on the third party;
- (b) one of the parties to the venture does not want his relationship disclosed, such as a supplier or subcontractor joint venturing with a general contractor and at the same time bidding other general contractors; and
- (c) one of the members of the venture is not licensed in the area of the job and a disclosure of his involvement might cause the bid to be disallowed (caveat — this will not cure the problem in certain states and on certain types of project); and

Irrespective of the fact that the responsibilities and obligations of the joint venturers to each other in a silent joint venture are limited to those defined in the joint venture agreement and application, certain common elements and principles exist in all these arrangements. The silent joint venturer has no direct responsibility or obligation to the owner for completion of the work. Similarly, upon default or non-performance by the joint venture, the

silent joint venturer has no direct standing with the owner which would enable the silent venturer in his own right to step in and remedy the default. From the silent venturer's standpoint, this arrangement has serious shortcomings since the silent venturer has all the liability of a member of a regular joint venture without having the necessary means to minimize his liability.

If the intent of the parties is merely to provide for an indemnitor for the purpose of obtaining a bond, then the parties should consider using the silent joint venture as a vehicle to achieve this purpose since the liability of a joint venturer (even silent) could end up being considerably broader than the obligation that an indemnitor assumes to a surety.

Prior to, and as a condition precedent of, issuing a bid bond to a silent joint venture, the surety normally requires a written commitment from all the members, including the silent venturer to execute the bond application and indemnity agreement and to be bound by the bid and the obligations incumbent with a bid bond and indemnity agreement. If such is not obtained, then the surety could be in the position of having issued a bid bond with the silent venturer unnamed and thus uncommitted. Similarly, if the party supplying the bonding capacity believes the bid is too low or for some other reason does not want to sign the take out Payment and Performance Bonds, then provision needs to be made to prevent the other venturer from going forward without the consent of all venturers. A form of a pre-bid

silent joint venture agreement is contained hereafter and paragraphs 1 and 3 prevent the non-financially sound party from proceeding without the consent of the financial party.

There is very little, if any, protection for the silent, inactive venturer whose capacity is little more than that of an indemnitor to obtain bonding. A suggested form of joint venture agreement has been drafted for the protection of the silent venturer who is inactive on the job.

If the silent venturer is going to supply an equally proportionate amount of capital, equipment, personnel and other items, then the standard form joint venture agreement in Chapter 4 hereof may be used with the recognition and change to the agreement that the contract will be taken and the bond issued solely in the name of one member of the joint venture and not both members but with the further recognition that this in no way detracts from the fact that it is a joint venture and the parties are equal joint venturers.

Most contracts with governmental agencies require each member of a joint venture to be identified and to execute the contract and bond. Thus, a silent joint venture agreement should not be used on any such project or contract since to do so could expose all parties to fraud and other charges, both civil and criminal. ■

Pre-Bid Silent Joint Venture Agreement

This Agreement made this _____ day of _____, 199____, by and between _____ (herein called "Contractor"), party of the first part, and _____ (herein called "Silent Venturer"), party of the second part,

WITNESSETH:

WHEREAS, Contractor intends to submit a bid on the Contract for construction of _____ (hereinafter called "Project") ; and

WHEREAS, if the Contract is awarded to Contractor and the Contract is entered into for its performance by Contractor and the owner, Contractor and Silent Venturer 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; and

WHEREAS _____ as Surety (hereinafter called "Surety") has agreed to issue a Bid Bond in connection with the bid which the parties propose to submit on the Project.

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

1. Contractor shall execute: a) all Indemnity and other agreements required by the Surety in connection with the Surety executing any Bonds as to the Project, b) said Bid Bond in connection with the bid that is submitted, and c) any Performance and Payment Bonds required in connection with the

Contract if the same is awarded to, and accepted by, said Contractor and if the Surety issues each such Bond.

2. Irrespective of anything in the joint venture agreement to the contrary, the parties hereto agree to be joint venturers and as such to be jointly and severally liable to each other for the submission of said bid and the performance of the obligations of the Bid and other Bonds and Contract, if awarded.
3. If the Contract is awarded to and accepted by Contractor, and if the Surety issues the Payment Bond and Performance Bond, the parties hereto shall be and become joint venturers for the performance of the Contract and as such the parties shall share in the profits or losses thereof equally, or as otherwise mutually agreed upon between them, shall be jointly and severally liable for performance in connection with the bid that is submitted.
4. The parties agree to execute a formal Joint Venture Agreement in the form attached hereto as Exhibit A, which shall designate both the respective rights and obligations of the parties and the authority to control the work or act as agent for each other.
5. If the Surety issues the Bid, Performance or Payment Bonds relating to the bid or Contract on this Project, then this Agreement may not be cancelled, abrogated or amended except with the prior written consent of Surety and Silent Venturer.

IN WITNESS WHEREOF, the parties have executed this Pre-Bid Agreement in multiple copies on the day and year first above written.

Witness or Attest:

_____ Contractor
 _____ Silent Venturer

Silent Joint Venture Agreement

THIS AGREEMENT, made and entered into this _____ day of _____, 199____, by and between _____, whose principal office and place of business is at _____ herein called "Contractor", First Party, and _____ whose principal office and place of business is at _____ herein called "Silent Venturer", Second Party.

WITNESSETH:

WHEREAS, _____, as Owner, has indicated its intent to award to the Contractor a Contract in accordance with drawings and specifications prepared by _____, Architect; and

WHEREAS, Contractor needs to obtain Payment and Performance Bonds ("Bonds") in the penal sum of \$ _____; and

WHEREAS, Contractor can obtain such Bonds from _____, (hereinafter called "Surety"), if and only if Silent Venturer will join it in the application therefor; and

WHEREAS, Silent Venturer is willing to execute said application of Surety 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 to, and indemnification of, the Surety for the Bid Bond and Payment and Performance Bonds in the penal sum of said Contract, and Silent Venturer will join Contractor

in executing the agreements contained in said application.

2. If the Surety executes such Bonds after receiving an application and indemnification by Silent Venturer, then Contractor covenants and agrees to pay Silent Venturer the sum of \$ _____, and to make and effect such payment by _____ . 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.
3. In addition to the sums set forth in paragraph 2 hereof, Silent Venturer shall receive _____ percent (____ %) 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 the performance or non-performance of, this Contract.
4. 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 observe, at its own sole cost and expense and without cost or expense to Silent Venturer, to-wit:
 - (a) Contractor shall faithfully perform each and every obligation and punctually make each and every payment incumbent on it under, by virtue of, or in relation to, said Contract or work to be done;
 - (b) Contractor will not suffer or permit any default to arise under, or in relation to, said Contract or work;
 - (c) Contractor will pay the premium(s) on said Bonds as soon as the same shall become due;

- (d) Contractor shall faithfully perform each and every covenant and agreement for said Bonds and indemnity agreement and observe all the other terms and conditions contained therein;
- (e) 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, the work provided for therein or moneys payable thereunder, as are granted to the Surety in and by any indemnity agreement or application or both;
- (f) Contractor shall establish in such bank(s) as Silent Venturer may designate from time to time, a separate and special trust bank account, herein called the "trust account", and to be identified as such on the records of the bank as a trust account solely for the joint venture Contractor who shall receive in trust all moneys due under or on account of said Contract and shall deposit such moneys, as soon as received, in said trust account(s), and shall not permit any moneys to be withdrawn from any such trust account except in the manner and for the purposes hereinafter provided. Until such trust account is 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 the sole signature of such person(s) as Silent Venturer alone may designate from time to time under and pursuant to paragraph 8 hereof.
- (g) Contractor shall pay promptly, as the same become due, all obligations incurred in connection with said Contract or prosecution of the work provided for therein, including the premium for said Bonds; and
- (h) As and when requested by the Silent Venturer, Contractor shall provide Silent Venturer proof that it has paid for all items covered by said Bonds in the work covered by said payment,

whereupon Contractor shall be entitled to reimbursement from said trust account, for the amounts which it expended in connection with any item as to which payment has been made, up to but not in excess of the lesser of (i) eighty-five percent (85%) of the estimate covered by said payment, or (ii) the balance then on deposit in said trust account, such reimbursement to be by check drawn on said trust account signed as herein provided.

- 5. If and to the extent that payments, if any accruing to Contractor under the Contract 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 immediately supply any deficiency forthwith.
- 6. 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.
- 7. Silent Venturer shall have no duty or responsibility at any time 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 at any time to insist upon complete and precise performance in accordance with the tenor hereof.
- 8. Silent Venturer's rights and privileges herein are intended to be exercisable from the date hereof and are not dependent on any default of the Contractor under said Contract, application for Bonds or other instrument.
- 9. If and at any time that the 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 or herein, or both, the 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 main-

tained at the time and on so doing, the authority of Contractor to sign, or to designate a representative to sign, checks for the withdrawal of funds therefrom, jointly with the Silent Venturer, shall be terminated instantly at the election of the 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 the Silent Venturer alone may designate in writing from time to time; and

(b) in addition to other rights which the Silent Venturer has, it has the unrestricted right to remove Contractor from the job site and install itself as completing contractor or perform the balance of the work itself or place a contractor of the Silent Venturer's selection as completing contractor and Contractor shall forfeit all rights to any proceeds and shall immediately reimburse the Silent Venturer for any losses then or thereafter incurred.

10. Although this joint venture arrangement may be

styled or considered for certain purposes, it is specifically understood and agreed that Contractor shall perform all work, pay all charges in connection therewith, under the Contract, provide all workers, 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 except at its sole option to do anything in connection with the Contract except to join in the application for the Contract Bond and other documents incident thereto.

11. 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 day and year first above mentioned.

Contractor

Silent Venturer

Contribution Bonds (Cross Indemnity Bonds) Between Joint Venturers

Members of a joint venture are jointly and severally liable to the owner for the full performance of the contract and the satisfaction of all costs incurred in connection with such performance. Many consider it the essence of a true joint venture that the members thereof should also be similarly liable to the surety. Various methods have been conceived to allow a member of the joint venture either to limit his indemnity obligation or to obtain a guarantee of performance from his joint venture member. However, most of these methods have not been accepted by the surety industry since these methods tend to avoid joint and several liability and strike at the very heart of the joint venture arrangement itself.

Out of this background were drafted Contribution Bonds (Cross Indemnity Bonds) of joint venturers. The acceptance of these Bids both by contractors and surety companies has been limited.

The purpose of these bonds is not in any way related to splitting or dividing the work among the joint

venturers. Instead, their purpose is to assure that the joint venture is adequately financed. As such, these bonds are pure financial guarantees — nothing more.

Contribution bonds thus fall into two categories, forms of which are attached hereto.

(a) The first form guarantees the obligation of the principal to advance his share of contributions to the funding of the joint venture during its life as required by the Joint Venture Agreement.

(b) The second form guarantees the obligation of the principal to reimburse co-venturers and their sureties for his share of any ultimate loss sustained by the joint venture at the time of the final accounting. This second form of bond does not overlap the first form in that it does not guarantee that the principal will respond to any calls for contribution of funds during the life of the project.

Any usage of these bonds will necessarily require the joint venture agreement between the co-venturers

to be written so as to reflect the terms of the type of bond given. For example, in the event the first form of bond is used guaranteeing the principal's obligation to advance funds, then the joint venture agreement should recognize the right of the surety:

(a) at its election, to have a voice and vote in the affairs of the joint venture at least in proportion to the funds it has advanced;

(b) to have a standing in the joint venture if it cures any default by its principal and the extent of such standing; and

(c) to be reimbursed (prior to any funds being paid over to its principal) a sum equal to any amounts advanced for the benefit of the principal plus interest from the date of such advance.

A form of joint venture agreement covering this type of arrangement is not attached since it would vary in direct relation to the form of contribution bond utilized. ■

Form Guaranteeing Obligation of Co-Venturer Principal to Advance His Share of Contributions

KNOW ALL MEN BY THESE PRESENTS THAT WE, _____, as Principal, and _____, as Surety, are held and firmly bound herein in the penal sum of (\$ _____), to the following parties as Obligees:

Co-Venturer:

Surety of Such Co-Venturer:

WHEREAS, Principal and Co-Venturers have entered into a contract with _____ as Owner, dated _____ for the construction of _____ ("Contract") and have entered into a Joint Venture Agreement dated _____ defining their respective interest and responsibilities under the mentioned Contract;

WHEREAS, Surety and Sureties for the Co-Venturers have executed as Co-Sureties on a limited Co-Surety basis, a bond on behalf of Principal and Co-Venturers in favor of the Owner in the aggregate penal sum of (\$ _____), which according to its terms guarantees the faithful performance of the Contract and payment of labor and material bills;

WHEREAS, Principal and Surety and each Co-Venturer and its Surety desire indemnity from each

other to protect against loss caused by the default of any member of the Joint Venture in the performance of its obligation to advance funds promptly in such amounts and at such time as provided in the Joint Venture Agreement;

WHEREAS, Surety has agreed to execute this Bond on behalf of Principal subject to the conditions and limitations set forth herein;

NOW THEREFORE, the condition of this obligation is such that if Principal shall promptly advance funds to or for the benefit of the Joint Venture as required by the Joint Venture Agreement, and in an amount or amounts reasonably related to the needs and purposes of the Joint Venture, then this obligation shall be null and void, otherwise to remain in full force and effect. Provided, however:

1. Surety's obligation hereunder shall not exceed in the aggregate the penal sum of this Bond and may be paid at the option of Surety to the Joint Venture or to Co-Venturers and their Sureties as their interests may appear.
2. In the final accounting of the Joint Venture, Surety shall be entitled to participate ratably for any funds it may have advanced under the Bond.
3. In the event Co-Venturers and their Sureties sustain loss within the terms of the Bonds, but in excess of the amount payable hereunder, Co-Venturers and their Sureties shall have priority of salvage rights.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement this _____ day of _____, 199__.

Principal: _____

Surety: _____

Form Guaranteeing Obligation of Co-Venturer Principal to Reimburse Other Venturers for Share of Ultimate Loss

KNOW ALL MEN BY THESE PRESENTS THAT WE, _____, as Principal, and _____, as Surety, are held and firmly bound as set forth herein in the penal sum of _____ (\$ _____), to the following parties as Obligees:

Co-Venturer:

Surety of Such Co-Venturer:

WHEREAS, Principal and Co-Venturers have entered into a contract ("Contract") with _____ as Owner, dated _____, for the construction of _____ and have entered into a Joint Venture Agreement dated _____ defining their respective interests and responsibilities under this Contract;

WHEREAS, Surety and the Sureties for the Co-Venturers have executed, as Co-Sureties on a limited Co-Surety basis, a bond on behalf of Principal and Co-Venturers on behalf of the Owner in the aggregate penal sum of (\$ _____), which according to its terms guarantees the faithful performance of the Contract and payment of labor and material bills,

which bond is hereinafter called the Primary Bond;

WHEREAS, Principal and Surety and each Co-Venturer and its Surety desire indemnity from each other to protect against loss caused by the default of any member of the joint venture in the performance of its obligations under the Contract and the Joint Venture Agreement;

WHEREAS, Surety has agreed to execute this bond on behalf of Principal subject to the conditions and limitations set forth herein;

NOW THEREFORE, the condition of this obligation is such that if Principal shall reimburse Co-Venturers and their Sureties for any ultimate loss which they shall sustain as a result of any default on the part of Principal in the performance of its obligations under the Contract and the Joint Venture Agreement or either of them, then this obligation shall be null and void; otherwise it will remain in full force and effect. Provided, however:

1. In the event Principal shall default in the performance of any obligation to perform or arrange performance on such obligation and in the event Surety does not so perform or arrange performance and if Co-Venturers and their Sureties complete the work of the Contract and the Joint Venture Agreement, Surety will reimburse Co-Venturers and their Sureties, subject to the provisions of this Bond, for all ultimate loss so sustained by them.
2. Surety's liability under this Bond and the Primary Bond shall not exceed the amount of Surety's obligation under the Primary Bond. Claims and obligations under the Primary Bond shall have priority and shall first be satisfied. After exoneration or discharge of the Primary Bond, the Surety's net loss thereunder, if

any, shall be deducted from the penal sum of this Bond, and the balance, if any, shall be available to Co-Venturers as an aggregate sum, as their interests may appear, and as provided herein.

3. In the event Co-Venturers and their Sureties sustain loss within the terms of this Bond; but in excess of the amount payable hereunder, Co-Venturers and their Sureties shall have priority of salvage rights.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement this _____ day of _____, 199 ____ .

Principal:

Surety:

A Plan for Cooperation Between Insurance Agents/Brokers on a Joint Venture Project

Not only must the insurance coverage on a joint venture project be determined, but which agents will handle the bonds and insurance requirements also needs to be resolved. The following plan is one method for handling the insurance and bonding needs for a joint venture.

1. The insurance agent of the sponsoring contractor shall be named the sponsoring agent and the sponsoring agent shall have the immediate and total responsibility to the joint venture for everything related to the insuring of that joint venture. The sponsoring agent can delegate this responsibility to others, but in no way does this lessen the total responsibility of the sponsoring agent. The insurance agents for the other venturers (referred to here as cooperating agents) retain the full responsibility for seeing that their principal's interest is properly covered.
2. It is the sponsoring agents initial responsibility to gather all facts regarding the venture, analyze the risk, submit the analysis and the facts related thereto to the cooperating agent(s) for approval and when agreement is reached, move to the second stage. If agreement cannot be reached between the sponsoring and cooperating agent, then the point of disagreement will be submitted back to the principals by the sponsoring agent for their decision.
3. It is the responsibility of the cooperating agent to advise the sponsoring agent of any special advantages that the cooperating agents enjoy with respect to the analysis of the risk. This would include special forms, market entrees, experience and the like.
4. The sponsoring agent would then market the joint venture insurance program. The sponsoring agent would take full advantage of any special advantages enjoyed by the cooperating agent.
5. The sponsoring agent will keep the cooperating agents fully informed on all matters of any importance related to the insurance program. This would include, at least, the furnishing to each cooperating agent of copies of all policies, endorsements, agreement with the carrier, copies of all correspondence of material matters, and a memorandum of any important discussions with the insurance carrier, or any other interested persons. It would normally not include advice to the cooperating agent on such matters as the mailing of certificates, the discussion of small losses, the change of automobile or other units on or off the policy and the like. The cooperating agents should be kept fully informed on loss summaries, engineering reports and other information of this character.
6. Irrespective of who issues the policy, all commissions will be paid into a common pot, controlled by the sponsoring agent. At some convenient time, all agents will submit to the sponsoring agent a list of their out-of-pocket expenses. This would include particularly travel expense, services purchased and any other unusual expense. It would not include any internal expense nor any expense for time spent by any of the agents. All of these expenses would be reimbursed by the sponsoring agent out of the pot. Commissions remaining in the pot after expenses would be distributed to each agent participating in the same proposition that that agent's client had an interest in the profits of the joint venture at the inception of the joint venture. The commissions could also be divided equally if the agents so chose.
7. There are special problems to be resolved with respect to joint venture insurance and some of those are as follows:
 - (a) The agents and the venturers must agree what the minimum limit would be carried on any umbrella covering the venture;
 - (b) A joint venture presents a unique problem because the accident which occurs as a result of joint venture activities may not be reported until long after the joint venture is disbanded. Care must be taken to stop any liability from flowing to the individual venturers after the venture is complete.
 - (c) Completed operations is, of course, one of the principal hazards that continues after the joint venture is complete. It is suggested that this coverage be negotiated at the time the joint venture insurance is

placed, in a way that will extend the completed operations coverage for a period of at least five (5) years after completion of the job or, even more preferable, to the end of the statutory limitation for the liability. Consideration should be given to doing this at a flat premium. An alternative is to negotiate with each of the venturers' insurance carriers the addition of the joint venture risk on each of the individual policies. Each venturer would cover only his own risk arising out of this joint venture, but it would then extend coverage for whatever length of time is deemed necessary.

- (d) Any comment with regard to completed operations above, applies equally with respect to contractual liability coverage.
- (e) During the maintenance period following the completion of the joint venture project, the joint venture should consider subcontracting the maintenance responsibility to one of the venturers and this venturer should undertake the insurance responsibility and file certificates with each member

of the joint venture.

- (f) Although it is quite improbable that a retrospective rating approach will be used on a joint venture, the agents concerned should give substantial attention to the problems that will arise out of retrospective premium adjustments two (2) or three (3) years after the venture is complete. Once the reserves for loss appear to be reasonably stabilized, every effort should be made to reach an agreement with the insurance carrier to avoid any further adjustment.
- (g) On any joint venture of any length of time, special attention should be given to the employee benefits, such as group life, hospitalization, and similar benefits, on any employees loaned to the joint venture by the various venturers.
- (h) If equipment is rented to the joint venture by one of the venturers, agreement should be reached regarding the responsibility for damage to that equipment which is not insured under the owner's policy or which is subject to a deductible.

- (i) The discovery period on fidelity coverage should be extended beyond the one (1) year period since fidelity coverage will cease at the end of the joint venture.

8. Guidelines for Surety Support:

- (a) The agents handling the surety requirements for each venturer should be advised at the earliest possible date to contact the sponsoring agent to coordinate the financial information required.
- (b) Each venturer's surety should have the opportunity to participate in the same proportion that their principals participate.
- (c) A pre-bid agreement establishing terms and conditions of the final joint venture agreement should be submitted to each surety by the sponsoring agent.
- (d) To avoid last minute misunderstandings as to various sureties' requirements for such items as indemnity, the sponsor should advise all venturers well before the bid date of the final terms, conditions and requirements of the sureties. ■