



INTRODUCTION

This is the fourth (4th) publication in a series of five (5) planned focus topic articles prepared by GATE 6 Solutions, Inc. (GATE 6), presenting focused discussions on areas that address various strategic and tactical considerations unique to the formation, administration, management, and dissolution of an Un-populated LLC. The five (5) topic articles cover:

- Protecting Proprietary Data without Compromising Regulatory Compliance
- The Small Business Administration (SBA) – JV Rules
- **Contract Administration, Performance Reporting, and Compliance**
- Formation and Exit Strategies
- Contract Close-out Consideration

On October 7, 2009, from 10:00 – 11:30 AM, GATE 6 Executive representatives Mr. Bruce Bowland, Executive Vice President and Director of Government Contractor Services and Mr. J. Michael Foley, CEO/President will be presenting a seminar at the Double Tree Inn in Oak Ridge, TN on the challenges faced by Un-populated LLCs. This workshop is sponsored by the East TN Chapter of the National Contract Management Association (NCMA). Stay tuned for further articles and announcements on this upcoming seminar.

Focus Topic No. 3 – Contract Administration of “Un-Populated” JV/LLCs - Managing the Contract, Performance Reporting, and Compliance

BACKGROUND

As described in previous articles in this series, Federal Government Contractors are experiencing a high incidence of large, “bundled” procurement actions.

Contractors have responded by joining together in a team relationship in some cases by creating a new business entity for the specific purpose of pursuing the “bundled” procurement, often in the form of Limited Liability Corporations (LLCs). This business formation offers the Government a “best value” solution by providing streamlined contract management (a single contract privity approach) at reduced cost (best value) as compared to the traditional “tiered” prime/subcontractor relationships.

In the furtherance of “best value” thinking, it is now becoming more common for the LLC to not have W-2 employees (the concept of the “un-populated” LLC) and in so doing, the founding members/partners, also enter into subcontract agreements with the LLC to fulfill the Contract requirements by providing labor or performance of specific tasks.

The challenge for “un-populated” LLCs then becomes one of how to perform all of the necessary and traditional back-office business functions such as: job cost accounting; contract/subcontract management; change management; internal/external performance reporting; compliance reporting; etc. of a normal populated business, while controlling and limiting the flow of proprietary data between the members. How does the “un-populated” LLC still provide the same Transparency, Accountability, and Reportability (T-A-R) of data to the Government, all in the absence of having any employees? The solution lies in outsourcing the contract management, performance reporting, and compliance responsibilities to a third party, i.e. an independent Business Services Integrator (BSI). The external T-A-R compliance and “firewalling” of the internal business sensitive and proprietary data flow between the member companies is managed and controlled by the BSI.

“UN-POPULATED” LLCs- THE BUSINESS OF DOING BUSINESS WITH THE GOVERNMENT IN THE ABSENCE OF ANY EMPLOYEES

The absence of any W-2 employees is neither an excuse, nor an exemption for an “un-populated” LLC to alleviate it from having to perform the usual and customary contract administration functions of a “populated” company. Neither is it exempt it from the FAR, GAAP, CAS, EVM, and other Government T-A-R requirements. Quite



the contrary, the “un-populated” LLC has the added burden of: a) having to protect the individual member company’s business sensitive and proprietary data from one another because they are competitors outside the LLC; and b) still provide the seamless external T-A-R. This was the topic of focus article no.1 in this series.

The “un-populated” LLC must still find a way to collect and integrate its contract administration and performance and compliance reporting functions seamlessly in order to comply with the T-A-R requirements in its Contract with the Government, while preventing the sharing of any member company proprietary information between the member companies. Remember, the members are only temporary “*captured clients*” while party to the “un-populated” LLC but will eventually emerge as competitors when the “deal is done” and the Contract work has been completed.

CONTRACT ADMINISTRATION

Contract administration involves those activities that are necessary after a contract has been awarded to ensure the “un-populated” LLC performance complies with the requirements of the Contract. Contract administration encompasses any dealings between the Government and the “un-populated” LLC, from the time the contract is awarded, until the work has been completed and accepted or the contract terminated, all payments have been made, and any open contract matters closed. As such, proper contract administration constitutes that primary component of the procurement process that assures the government gets what it paid for and the contractor is fairly compensated.

The specific nature and extent of contract administration varies from contract to contract. It can range from the minimum acceptance of a single delivery and payment, to extensive involvement by Government program, audit, and procurement officials throughout the contract term. Factors influencing the degree of contract administration include the nature of the work, the type of contract (ex. FFP, T&M, CP, ID/IQ, labor hour, etc.) or combination of contract types, value, and the experience and commitment of the personnel involved. Contract administration starts with developing a clear, concise, performance

based understanding of the statement(s) of work (SOW) to the extent possible, and preparing a Contract Administration Plan (CAP) that cost-effectively measures performance, tracks all deliverables and provides supportable documentation for payment.

The well developed CAP should be designed to facilitate effective and efficient management with due consideration given to:

- Level of contract surveillance
- Terms and Conditions related to administration
- Performance milestones and deliverables
- Reporting procedures, requirements and protocols, and
- Quality requirements
- Compliance requirements

The CAP should also define the positions and identify the individuals responsible for developing a strong working relationship with both the CO and COTR in order to establish and achieve mutually acceptable and measurable contract objectives. The CO and COTR are tasked and warranted with the authority and responsibility for ensuring that the contracting process is successful from the Governments perspective. The “un-populated” LLC must identify its CO/COTR counterparts and manage a positive relationship with them.

With the “un-populated” LLC, contract work is performed by the member subcontractors and lower tier subcontractors via subcontracts from the LLC. Since actual contract performance is thereby, one step removed from the contracting entity (privity of contract), the BSI provides for the development and administration of the CAP but with a stronger emphasis on flowing the CAP measurement, quality and reporting protocol requirements down through the multiple subcontractor tiers in accordance with the “un-populated” LLC operating agreement and Contract provisions. The BSI works directly with, and at the direction of the “un-populated” LLC General Manager and Project Manager designated by the member subcontractors in order to foster unity and communication between the Government and the “un-populated” LLC; the “un-populated” LLC and its member



subcontractors; and the member subcontractors and their respective lower tier subcontractors.

PERFORMANCE REPORTING

During contract performance, actual performance must be observed, information collected, and progress measured. These activities are essential to effective management and control. It can require a variety of resources, dedicated to these tasks and techniques, to be effective. On large contracts, the government may require the use and possible certification of an Earned Value Management System (EVMS) to ensure that all aspects of schedule, cost, and technical performance are effectively integrated and successfully implemented. (ANSI/EIA- 748, DOE Order 4234.3A) Cost and schedule information must be captured at the member subcontractor and the lower subcontractor tiers to allow consistency in reporting of the “un-populated” LLC performance data to the Government. This may require the establishment and management of a standardized Work Breakdown Structure (WBS), along with policies and procedures, vertically through the multi-tiered subcontractor structure (i.e. member and lower tiers) in order to support the performance reporting and project control requirements.

The BSI serves a central role in EVMS performance measurement and reporting by establishing and maintaining the processes, procedures and systems for, and the administration and management of, the project control, cost and schedule, performance, and data collection and reporting.

The lower tier subcontractors must also maintain their respective EVMS data and ultimately provide it to the BSI for consolidation within the “un-populated” LLC for subsequent reporting to the Government. While each subcontractor within each tier must have the resources to support the EVMS functionality for its respective organization, the “un-populated” LLC does not, because its EVMS functions and reporting to the Government is provided by the BSI. Additionally, the BSI can accomplish its performance reporting function in a virtual and secure distributed platform environment as a central repository and processor thereby

eliminating the necessity to be resident at a particular project location.

COMPLIANCE REPORTING

Depending on the type of contract or combination of contract types, complexity, and value, the “un-populated” LLC can be subjected to a variety of compliance reporting requirements specific to the contract or by reference to FAR, CAS, and/or GAAP provisions in the Contract.

For example, FAR 52.216-7, *Allowable Cost and Payment*, found in flexibly priced contracts (i.e. cost and T&M type), requires the annual submission of an incurred cost proposal. Because this compliance reporting requirement requires the submission of historical direct and indirect costs at a very granular level, compliance can be daunting if proper job cost accounting architecture, and policies and procedures aren’t in place at the onset of the contract to capture the direct and indirect cost data at the level of reporting required. Similarly, CAS covered contracts require the filing of a CAS DS-1 Form for compliance with CAS and must be revised whenever an accounting change is anticipated.

Therefore, proper compliance planning is essential at the onset of any contract to ensure that the “un-populated” LLC and its lower tier subcontractors conform to all of the rules, statutes, and regulations, where applicable.

The BSI serves a very pivotal hands-on management role with respect to contract, statutory and regulatory compliance. The BSI, as the “*gatekeeper*” for restricting the flow of business sensitive and proprietary financial data between the “un-populated” LLC subcontract members, and the “*disseminator*” of this same information to the Government, must design and implement the architecture and policies and procedures necessary to restrict the flow of sensitive data within the “un-populated” LLC member companies but still comply with the required levels of granularity for compliance reporting.

Therefore, the BSI must provide a system for complete T-A-R compliance to the Government, but limit T-A-R of the “un-populated” LLC member companies to only their respective data.



The system established by the BSI for meeting the compliance reporting requirements must also serve to support proper invoicing requirements in order to ensure timely, accurate payment by the Government. The Government expects the contractor to meet all contract requirements for quality, quantity and timeliness. The “un-populated” LLC expects no less of the government in meeting its obligation to timely, accurate payment for supplies and services received. The BSI system design must provide for near seamless processes and procedures for quickly and efficiently meeting this obligation.

The BSI also serves as the communication link on matters of compliance reporting between the “un-populated” LLC and the Government. An important aspect of timely voucher (invoice) review, approval, and payment is good communication between the Government CO and COTR, and the “un-populated” LLC finance official to ensure that payment is made on time.

CONCLUSION

Contract administration, compliance, and performance reporting requirements, in the performance of the contract are applicable to the contracting entity irrespective of the business formation. The “un-populated” LLC is still held to the same standards of compliance, reporting, and execution as any other “populated business.

Focus Article #1 of this series discussed the benefits and competitive advantages a Business Services Integrator (BSI) provides to the “un-populated” LLC by managing and satisfying the Transparency, Accountability, and Reportability (T-A-R) requirements with the ability to also protect the business sensitive and proprietary data of the individual “un-populated” LLC members. The BSI plays a critical and pivotal role between the member companies and the Government by managing the entire contract administration, compliance, and performance reporting requirements. “Outsourcing” these non-core capabilities to the BSI, allows the “un-populated” LLC member companies to focus and perform their respective core competencies in accordance with the contract statement of objectives (SOO), scope of work (SOW), or Performance Work Statement (PWS).

While the “rules of engagement” in an “un-populated” LLC business configuration are different, the “rules of performance” are not.

GATE 6 Solutions, Inc. has seasoned resources who are experienced practitioners with the government procurement lifecycle and its complexities. We are experienced with assisting companies evaluate strategies to pursue government contracts, establish JV agreements and LLCs, and provide these JVs with Business Services Integration (BSI) services during the procurement lifecycle. Some of the services that our clients count on us for

- Performance Measurement and Earned Value Management (EVMS) [ANSI/EIA 748]
- Project Management, Estimating, Scheduling, Cost Management, and Project Control [DOE Order/Manual 413.3]
- Change Management, Requests for Equitable Adjustment (REA), Claims & Dispute Resolution (DR)
- DCAA Audit Support and Cost Recovery and Impact Mitigation
- FAR, CAS, and other Government Regulations Compliance
- Cost and Pricing Analysis and Request for Proposal (RFP) Preparation
- Accounting System Consulting, Implementation, Training, Support Services and Financial Reporting
- Prime and Subcontract Contract Compliance Monitoring and Management
- Project Closeout, Document Retention, and Legacy Contract Management

As a reminder, GATE 6 representatives, Mr. Bruce Bowland, Director of Government Contractor Services and Michael Foley, CEO/President will be presenting a short morning session seminar on October 7, 2009 in Oak Ridge, TN sponsored by the East TN Chapter of the National Contract Management Association, on the challenges faced by Un-Populated LLCs. “This paper does not necessarily represent the views of the East TN Chapter of the National Contract Management Association”.