

Understanding Commercially Useful Function



Division of Minority and Women's Business Development

About the Division of Minority and Women's Business Development ("DMWBD")

New York State Executive Law Article 15-A §§ 310-317 ("Article 15-A") governs requirements for the participation of minority and women-owned business enterprises ("MWBEs") in New York State contracting. The objective of Article 15-A is to promote equality of economic opportunities for MWBEs by eliminating barriers to their participation in New York State contracting.

DMWBD's mission is to promote equality of economic opportunities for MWBEs and to eliminate barriers to their participation in State contracting. DMWBD supports New York State's leaders with information and resources that increase access to opportunities for minority and women-owned businesses throughout the State.

About Commercially Useful Function ("CUF")

A contractor on a state contract may only report payments to a Minority or Women-owned Business Enterprise ("MWBE") towards the achievement of an MWBE participation goal if the MWBE's work performed constituted a commercially useful function ("CUF").

The CUF standard requires that MWBEs perform a useful role proportionate to the payment received for their work on a state contract. They may not act as a pass-through or unnecessary participant. Evaluation and determination of an MWBE's CUF happens on a case-by-case basis, by the contractors and state agencies, based upon each MWBE's contractually established role on each state contract. **MWBE certification does not automatically guarantee that an MWBE will perform a CUF on any individual contract.**

The specific tasks performed by an MWBE affect the CUF and the associated credit that a contractor may report towards meeting an MWBE participation goal. DMWBD has established additional guidance on reporting MWBE participation credit when utilizing MWBE suppliers and brokers.

Commercially Useful Function "Red Flags"

If any of these conditions exist, a CUF red flag is raised. However, not every red flag means there is a CUF violation. Red flags are analyzed on an individual basis. Some examples of **CUF red flags** include:

1. The work performed by the MWBE is not consistent with the industry classification codes assigned to them by DMWBD;
2. The MWBE does not supervise the work it has been contracted to perform;
3. Work is performed by personnel normally employed by another business, or work is completed jointly with another contractor;
4. Materials necessary for the MWBE's performance are delivered to, billed to, or paid by another business;
5. The contract value is inconsistent with the reasonable value of the MWBE's scope of work;
6. The MWBE subcontracts or assigns any portion of work to another firm;
7. Another contractor engaged on the project owns vehicles or equipment used by the MWBE to perform contracted work.

MWBEs and CUF

A MWBE firm performs a **commercially useful function** when it is responsible for the **execution of the work** of its contract and is:

- Performing;
- Managing; and,
- Supervising the work involved.

An MWBE performing a service on a state contract that requires the use of materials must also be responsible for ordering materials, negotiating price, determining quality and quantity, and installing the materials.

Additional key factors to consider for CUF include:

- If the subcontracted work is consistent with standard industry practices; and,
- If the amount the firm is paid under the contract is proportionate to the work that is being performed.

MWBE Suppliers and CUF

An MWBE participating on a state contract as a supplier performs a CUF when it sells materials, supplies, articles, or equipment out of its own inventory from a warehouse, yard, or other facility that it owns or leases. An MWBE does not perform a CUF if it fulfills an order for a customer by ordering, purchasing, or receiving supplies from a third party supplier rather than out of its own inventory.

Management Subcontract Work and CUF

The MWBE must manage the work that it has been contracted to perform, including, but not limited to:

1. Scheduling work operations;
2. Ordering equipment and materials;
3. Preparing and submitting certified payrolls; and,
4. Hiring and firing employees.

The MWBE must supervise daily operations through its own staff in order to perform a CUF.

CUF considerations include:

- Is there a contract specifying the specific work the MWBE is to perform?
- Have any of the supervisory staff of the MWBE ever been listed on any payroll of other contractors currently working on the job?

Contractor Case Study

The MWBE firm, **Firm Q**, is awarded a subcontract to install curbs and gutters. **Firm Q** will provide all equipment, personnel and will supervise.

A review of the performance found that some of the equipment used did not belong to **Firm Q**.

These are red flags that need follow up to determine if **Firm Q** performed a CUF on this contract. During the follow up, it was found that the equipment not belonging to **Firm Q** was leased while **Firm Q's** equipment was under repair.

Based on this finding, it was determined that **Firm Q** performs a CUF in this contract, based on CUF criteria.

In a case where an MWBE may not have the necessary equipment to complete the work, they may engage in formal agreement with another firm to lease or rent the necessary equipment in order to perform the work. In this case, the firm would still be performing a CUF.

Workforce and CUF

MWBEs cannot “share” employees with other contractors. The MWBE must be responsible for payroll and labor compliance requirements for all employees performing work on the contract.

CUF considerations include:

- Have any of the MWBE's employees ever been listed on any other contractor's payroll?
- Who does the MWBE on-site representative contact for hiring, firing or to modify the contract, if necessary?

Installation Case Study

MWBE firm, **Blue Construction (Blue)** has won a subcontracting contract from **Firm X** to install and manage the process for rebar for a building.

Blue completes the paperwork, purchases the materials and manages the installation. **Firm X** is given credit for MWBE utilization. However **Wit Construction**, a non-MWBE, actually installed MWBE the rebar. **Wit** was paid directly by **Firm X**.

Despite its certifications, **Blue** did not perform a commercially useful function.

If an MWBE does little more than process paperwork, such as invoices for payment, while the work is actually performed by a non-MWBE, CUF is not performed.

Performance and CUF

The MWBE must also be responsible for the performance, management, and supervision of a distinct element of the work in accordance with their contract and normal industry practice.

CUF considerations include:

- Does the MWBE appear to have control over means and methods of work on its contract items?
- Has any other contractor performed any amount of work specified in the MWBE's contract?

Note: This guide provides generally applicable information, and is not intended to exhaustively describe all criteria, documents or examples related to commercially useful function.

For additional information, visit the MWBE website: esd.ny.gov/MWBE.html

HAVE QUESTIONS? MWBE Hotline: (212) 803-2414 | Email: MWBECertification@esd.ny.gov