

MANAGEMENT MEMO

	NUMBER: MM 05-03
SUBJECT: NEW REQUIREMENTS FOR COMMERCIALLY USEFUL FUNCTION AFFECTING SMALL, MICRO AND DISABLED VETERAN BUSINESS ENTERPRISES	DATE ISSUED: January 18, 2005
REFERENCES: MILITARY AND VETERANS CODE SECTION 999 ET SEQ. GOVERNMENT CODE SECTION 14387 ET SEQ. CALIFORNIA CODE OF REGULATIONS, TITLE II, DIVISION 2, CHAPTER 3, SUBCHAPTER 8, SECTION 1896 ET SEQ.	EXPIRES: January 18, 2006 ISSUING AGENCY: DEPARTMENT OF GENERAL SERVICES

Introduction

On January 1, 2004, Chapter 623, Statutes of 2003, became effective and required all small businesses, microbusinesses and disabled veteran business enterprises (DVBES) to perform a “commercially useful function” in any contract they perform for the state. This legislation contained changes to Government Code sections 14837, 14838.6, 14839, 14842, and 14842.5, and Military and Veterans Code sections 999 and 999.6, providing the new requirements.

This Management Memo contains the policy and procedure to be used by state agencies to determine if a business is performing a commercially useful function.

Definition of Commercially Useful Function

As stated in Chapter 623, Statutes of 2003, a business performing a commercially useful function is one that does all of the following:

- Is responsible for the execution of a distinct element of the work of the contract.
- Carries out its obligation by actually performing, managing, or supervising the work involved.
- Performs work that is normal for its business, services and function.
- Is not further subcontracting a portion of the work that is greater than that expected to be subcontracted by normal industry practices.

A contractor, subcontractor, or supplier will not be considered to perform a commercially useful function if the contractor’s, subcontractor’s, or supplier’s role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of small business, microbusiness or DVBE participation.

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Note: Additional clarification is provided in the new Small Business Regulations, effective September 9, 2004. See Title 2, California Code of Regulations Section 1896 et seq., for the full text of the new regulations.

Purpose

The legislation seeks to prevent a certified small, micro or DVBE prime contractor from acting as a “pass through” or “front”, exchanging the benefits of certification for payment from a non-certified business. When subcontracting to small, micro or DVBE subcontractors, the intent is for the subcontractor to provide goods or services required for the performance of the contract rather than artificial or incidental participation that provides an “appearance” of participation to meet the socio-economic objectives of these programs. In the past, a small group of certified businesses have bid on state contracts in which they were performing little—if any—of the specific work of the contract. This legislation seeks to retain the benefits of certification for small, micro and DVBE businesses that have obtained the certification for that which it is intended – to support opportunities in the competition for state contracts that in turn support the business enterprises owned and/or operated by California small businesses and disabled veteran businesses.

Policy Statement

By definition, all certified small, micro and DVBE contractors, subcontractors and suppliers that bid on or participate in a state contract must perform a commercially useful function. “State contracts” include those initiated by verbal or written solicitation and/or paid for using the CAL-Card as a payment method. In addition, the requirement to determine commercially useful function is not affected by the applicability of the 5 percent small business and/or DVBE participation preference programs. Therefore, for certified small, micro and DVBE contractors, subcontractors and suppliers, there is no exception to this requirement. Certified small, micro and DVBE businesses must perform a commercially useful function to be in compliance with their certified status. Awarding departments must determine that a commercially useful function will be performed prior to award of the contract.

Implementation Process

As part of its normal certification process, the Department of General Services’ Office of Small Business and DVBE Certification (OSDC) will request and review information that applicant small, micro and DVBE businesses perform a commercially useful function. If it is determined that a small, micro or DVBE business does not perform a commercially useful function, it will not be certified by OSDC. For those small, micro

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Implementation Process,
continued

and DVBE businesses for which OSDC can determine at the time of certification that the business provides a commercially useful function, the website at www.pd.dgs.ca.gov/smbus will specify the element of work for which commercially useful function has been determined along with the certification status. This information will be posted as it becomes available.

When evaluating small, micro or DVBE businesses for contract award, if the OSDC website does not indicate determination of commercially useful function, or the element of work upon which the determination was based does not appear applicable to the awarding department's procurement, the awarding department must make the determination of commercially useful function based on the definition above. As part of the awarding department's bid evaluation process, the bidder must provide proof sufficient to satisfy the awarding department that a commercially useful function will be performed by the bidder, subcontractor or supplier specific to the work identified in the statement of work or contract. To ensure compliance prior to contract award, the awarding department must obtain documentation of commercially useful function with any bid submitted by or that includes a certified small, micro or DVBE business.

Requirements that must be met by awarding departments for commercially useful function compliance for non-IT service contracts are included in the State Contracting Manual, Vol. 1, Sections 8.14, 8.15 and 8.20.

Requirements that must be met as well as tools to assist awarding departments with commercially useful function compliance for IT goods and services, and non-IT goods contracts will be included in the State Contracting Manual, Vol. 2 (Purchasing Authority Manual) at its next scheduled revision. Prior to that update, additional information will be transmitted to awarding departments through a broadcast bulletin.

Compliance

Failure of a certified small, micro or DVBE business to demonstrate performance of a commercially useful function, when bidding as a prime contractor, will result in that certified bidder being eliminated from consideration. When the analysis discloses that a certified subcontractor/supplier is not providing a commercially useful function, a contract may still be awarded if the prime contractor is a responsible bidder without the involvement of the firm that has been determined not to provide a commercially useful function and/or the work can be performed by an alternate(s) small, micro or DVBE firm(s) where the substitution is determined to have no material effect on the bid.

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Compliance,
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With respect to possible sanction or decertification where it is determined that fraud or misrepresentation has occurred, information provided by bidders to demonstrate compliance with the commercially useful function requirement is covered by section 999.9 of the Military and Veterans Code for DVBEs and Government Code section 14842 for small/microbusinesses. Awarding departments are reminded of their responsibilities under these sections, particularly with respect to receipt of complaints, investigations, and reporting responsibility to OSDC.

Contact

For questions regarding commercially useful function determinations made by the OSDC, please contact:

OSDC Certification and Compliance Unit
DGS Procurement Division
916 375-4940
or via email to: <mailto:osdchelp@dgs.ca.gov>

For questions regarding this Management Memo, please contact:

Policy and Procedure Office
DGS Procurement Division
email to: ppo@dgs.ca.gov

For questions regarding the State Contracting Manual, Vol. 2, please contact:

Purchasing Authority Management Section
DGS Procurement Division
email to: <mailto:pams@dgs.ca.gov>

Signature

Original signed by Ron Joseph, Director

Ron Joseph, Director
Department of General Services
