

# PROVIDING A COMMERCIALY USEFUL FUNCTION

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DIVISION OF OPPORTUNITY, DIVERSITY, AND INCLUSION



# Understanding Commercially Useful Function

- OAC 123:2-16-15 Commercially Useful Function
- Commercially Useful Function applicability
- How to determine if a company is providing a CUF
  - Examples
  - Red flags
- Key factors analyzed to determine whether a CUF is being performed
- What is normal industry practice
- Monitoring
- What if a company is not CUF compliant



# Understanding Commercially Useful Function

## OAC 123:2-16-15 Commercially Useful Function (CUF)

*“Responsible for execution of the work of the contract or a distinct element of the work . . . by actually performing, managing, and supervising the work involved.”*

- CUF equates to how a company would act without the EDGE program
- Operates within Standard Industry Practices



# Understanding Commercially Useful Function

## Commercially Useful Function Applicability

### Who does this requirement apply to?

- All EDGE certified companies. No procurement categories are exempt

*When a company provides a CUF it must have a necessary and useful role in the transaction, of a kind for which there is a market outside the context of the program. The firm's role must not be a superfluous step added in an attempt to obtain credit towards the goal.*



# Understanding Commercially Useful Function

## How To Determine If a Company Is Providing a CUF

### Consideration for Evaluating CUF

1. Amount of work subcontracted
2. Standard Industry practice
3. EDGE's role



# Understanding Commercially Useful Function

## How To Determine If a Company Is Providing a CUF (cont.)

Key factors are analyzed to determine whether a CUF is being performed

- Evaluation of the amount of work subcontracted, it is consistent with normal industry practices
- Amount the firm is paid under the contract is commensurate with the work that is actually being performed to be credited towards the goal



# Understanding Commercially Useful Function

## How To Determine If a Company Is Providing a CUF (cont.)

- EDGE furnishes materials, the EDGE must be responsible for negotiating the price, for determining the quality and quantity of the material, ordering the material, and paying for it. As a contractor, an EDGE firm would typically be hired to both furnish the material and install it with its own labor force
- EDGE'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 EDGE participation. In essence, was the role merely a contrived arrangement for the purpose of meeting the EDGE contract goal



# Understanding Commercially Useful Function

## How To Determine If a Company Is Providing a CUF (cont.)

### The “Pass Through”, “Front Company”, and “Failure to Use”

A EDGE does not perform a CUF if it is an “extra participant” in a contract through which funds are passed to obtain the appearance of EDGE participation.

Simply adding an EDGE to a transaction and “passing” funds through the EDGE, by itself, is not sufficient.



# Understanding Commercially Useful Function

## How To Determine If a Company Is Providing a CUF (cont.)

### Example of a “Pass Trough” Company

On August 21, 2014, Carl "Drew" Boggs, Chief Executive Officer of Boggs Paving, Inc., pleaded guilty in U.S. District Court, Charlotte, North Carolina, to Conspiracy to Defraud the United States and Conspiracy to Commit Money Laundering.

According to the indictment, from 2003 through October 2013, Boggs fraudulently obtained tens of millions of dollars of construction contracts funded by the U.S. Department of Transportation, by certifying that Styx, a certified Disadvantaged Business Enterprise (DBE), performed several millions of dollars of work. In reality, the majority of the work was performed by Boggs and other non-DBEs.

To create the appearance that Styx performed the work and received the payments, it was alleged that Boggs, among other things, deposited the payments into a bank account owned by Styx, but controlled by Boggs. The respective funds were then paid back to Boggs and its affiliates.

(<http://www.pepperlaw.com/publications/is-your-dbe-performing-a-commercially-useful-function-enforcement-trends-in-dbe-fraud-cases-2012-11-01/>)



# Understanding Commercially Useful Function

## How To Determine If a Company Is Providing a CUF (cont.)

### Example of a “Front Company”

On November 12, 2014, Watson Maloy, President, WMCC Incorporated (WMCC), pleaded guilty to conspiracy in U.S. District Court, Pittsburgh, Pennsylvania. WMCC, a certified DBE, entered into DBE subcontracts valued at approximately \$1.9 million with prime contractors. The prime contracts related to this scheme are valued at \$43.6 million.

Maloy admitted that in 2012 and 2013, he and co-conspirators employed by Century Steel Erectors Co. LP (CSE), agreed to use WMCC as a front company to obtain profits from DBE contracts slated for legitimate DBE firms. CSE staff and not WMCC personnel actually found, negotiated, coordinated, performed, managed, and supervised the DBE subcontracts. Maloy's firm failed to perform a commercially useful function and CSE actually completed all DBE work including negotiating crane rentals, ordering supplies and materials, and recruiting union workers.

To conceal the scheme, Maloy admitted that CSE officials used WMCC letterhead and email accounts when communicating with general contractors and Pennsylvania Department of Transportation officials. CSE personnel possessed WMCC business cards, t-shirts, and hard hats, as well as magnetic WMCC placards to conceal CSE logos on construction vehicles.

(<http://www.pepperlaw.com/publications/is-your-dbe-performing-a-commercially-useful-function-enforcement-trends-in-dbe-fraud-cases-2012-11-01/>)



# Understanding Commercially Useful Function

## How To Determine If a Company Is Providing a CUF (cont.)

### *Example of a “Failure to Use”*

In 2006, Michael Tulio, the owner and operator of Tulio Landscaping, was convicted of conspiracy and mail fraud charges in connection with two contracts to replace storm drain pipes along one of the railroad lines of the Southeastern Pennsylvania Transportation Authority (SEPTA). Tulio’s bids for these contracts certified that, consistent with SEPTA’s program, a certain percentage of the work would be subcontracted to a minority-owned hauling firm. Tulio, however, never used the hauling firm and created fraudulent business utilization reports, invoices, and proof of payments, including altered checks, to create the appearance that his company had done so. Tulio paid the hauling firm a fee for the use of its name to secure these SEPTA contracts, but never intended to use the hauling firm to perform the requisite work. Tulio was sentenced to 15 months in prison, 24 months of supervised release and a \$40,000 fine. Tulio and his company were also debarred by the FTA for a period of three years. (<http://www.pepperlaw.com/publications/is-your-dbe-performing-a-commercially-useful-function-enforcement-trends-in-dbe-fraud-cases-2012-11-01/>)



# Understanding Commercially Useful Function

## How To Determine If a Company Is Providing a CUF (cont.)

### Red Flags

- Work to be performed by the EDGE is outside the EDGE's known experience or capability
- EDGE provides little or no supervision of the work, the EDGE supervisor is not a regular employee of the EDGE firm or supervision is performed by personnel associated with the prime contractor, another business, or personnel not under the control of the EDGE
- EDGE workforce is not under the EDGE control and direction or work is performed by personnel normally employed by the prime contractor or another business; any portion of the work designated to be performed by a EDGE subcontractor is performed by the prime contractor
- Equipment used by the EDGE belongs to the prime contractor or another contractor with no formal lease agreement or the equipment signs and markings cover another owners signs, etc.



# Understanding Commercially Useful Function

## How To Determine If a Company Is Providing a CUF (cont.)

### Red Flags

- Materials or supplies necessary for the EDGE firm's performance are delivered to, billed to, or paid by another business
- EDGE firm is working without a subcontract agreement
- EDGE trucking business use trucks owned by the prime contractor
- EDGE prime contractor only purchases materials while performing little or no work
- The agreement between the prime contractor and EDGE firm artificially inflates the EDGE participation or erodes the ownership, control or independence of the firm;
- EDGE firm works for only one prime contractor
- Employees work for both the EDGE firm and the prime contractor



# Understanding Commercially Useful Function

## How To Determine If a Company Is Providing a CUF (cont.)

### Red Flags

- Volume of work is beyond the capacity of the EDGE firm
- Inquiries by EOD representatives are answered by the prime contractor
- EDGE firm's owner is not aware of the status of the work or the performance of the business
- EDGE firm only processes paperwork



# Understanding Commercially Useful Function

## How To Determine If a Company Is Providing a CUF (cont.)

### Red Flags

- EDGE firm charges only a administration fee
- EDGE firm has no bid or quote for the materials or supplies purchased
- EDGE firm has credit lines less than purchase amounts
- EDGE business owner cannot produce paperwork for materials or supplies purchased e.g. invoices, purchase orders, delivery tickets, checks, etc.



# Understanding Commercially Useful Function

## Key Factors Analyzed To Determine Whether a CUF Is Being Performed

- Who schedules work operations
- Who ordered equipment and materials
- Who hire and fires employees
- Have any of the EDGE's employees ever shown up on any other contractor's payroll
- Who do the EDGE employees say they report to



# Understanding Commercially Useful Function

## Key Factors Analyzed To Determine Whether a CUF Is Being Performed (cont.)

- Does the equipment have the EDGE's markings or emblems
- Is there a written contract executed by the DBE to perform a distinct element of work
- Who makes arrangements for delivery of materials
- Who are the material invoices made out to
- Who scheduled delivery of materials
- In whose name are materials shipped
- Are two party checks are used, who are the parties identified as payable to?



# Understanding Commercially Useful Function

## How to determine if a company is providing a CUF (cont.)

### What is Normal Industry Practice

One of the most important elements when determining if your company is performing a CUF is to determine if its role on the project is consistent with “normal industry practice.”

This means, is your company performing the work or services in the manner normally performed by all contractors—EDGEs and non-EDGEs. However, even if your company is performing pursuant to normal industry practices if those practices, in fact, erode the ability of the your company to control its work and remain independent, it may raise questions about your company’s EDGE eligibility.

A general rule of thumb that you should consider is whether your company would be performing in the same manner if there was no EDGE program. As further evidence of meeting normal industry practice, you must consider if your company performs this work on non-state assisted contracts.



# Understanding Commercially Useful Function

**How to determine if a company is providing a CUF (cont.)**

## **Monitoring**

### **Self-Test**

1. Is your role is limited to that of an extra participant in a transaction in which funds are passed through for appearance of participation?
2. Is your company never on the jobsite?
3. Does your company shows up and the work performed by prime contractor (i.e., EDGE on construction in 3 piece suit and dress shoes and no other employees)?
4. Do you perform or exercise responsibility with its own work force?
5. Does your company not perform required amount of work for compensation received – with own workforce?



# Understanding Commercially Useful Function

**How to determine if a company is providing a CUF (cont.)**

## **Monitoring**

### **Self-Test**

6. Are your employees supervised by another contractor?
7. Is your portion of the actual work performed by personnel normally employed by the prime contractor or another business?
8. Are your employees paid by you or prime contractor?
9. Do you use equipment that belongs to the prime contractor or another contractor with no formal lease agreement?
10. Does your equipment have signs and markings to cover another owner's identity?



# Understanding Commercially Useful Function

## How to determine if a company is providing a CUF (cont.)

### Self Test for Determining if Your Company is Providing a CUF

11. Are materials you are responsible for ordered, or paid for, by the prime contractor?
11. Are you being paid with two party checks or joint checks are sent by the prime to the supplier or manufacturer?
12. Are materials or supplies necessary for your company's performance are delivered to, billed to, or paid by another business?
13. Are materials delivered to the jobsite by a party separate from your company?
14. Is payment for materials deducted by the prime contractor from payments made to your company?
15. Does your company only purchases materials while performing little or no work?



# Understanding Commercially Useful Function

## What if a company is not CUF compliant

1. Possible Revocation of Certification
2. Possible Debarment
3. Loss of Contracts/Business
4. Loss of Business Reputation



# Understanding Commercially Useful Function

## Former Disadvantaged Business Enterprise Owner Indicted for Fraud

On December 18, 2014, Elizabeth Perino, former owner, Perdel Contracting Company (Perdel), Chicago, Illinois, was indicted in U.S. District Court, and charged in a DBE fraud scheme. Perdel specialized in concrete and carpentry work and was certified as a DBE in the city of Chicago.

The indictment alleged that in 2011, Perino, along with a co-conspirator, agreed to have Perdel act as a pass through DBE by making it falsely appear as though Perdel would provide labor and equipment on a multi-million dollar project at Chicago's O'Hare International Airport (O'Hare). Perino falsified various Perdel documents in order to disguise the fact that Perdel did not meet the DBE requirements, and thus the prime contractor did not either. Perdel did not perform any labor or provide any equipment. As part of the scheme, Perdel was to purchase equipment from the prime contractor to make it appear as if they had the proper equipment to perform the work. At the conclusion of the project, Perdel would sell the equipment back to the prime contractor. Further, all workers and equipment were provided by the prime contractor and loaned to Perdel to make it appear Perdel was actually completing the contracted work.



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