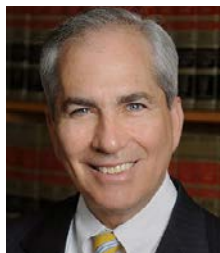


CREDIT AND (ALMOST) NO CREDIT: CHANGES TO NEW YORK STATE MWBE RULES REGARDING “BROKERS” AND “SUPPLIERS”



By Henry L. Goldberg, *Managing Partner, Goldberg & Connolly & STA Legal Counsel*

Given the Governor’s statewide 30% MWBE utilization goal, mounting pressure to meet such goals, and increasing concerns about MWBE related fraud, it is increasingly important for subcontractor’s to be up-to-date on their knowledge of the MWBE regulatory scheme. Typically, a subcontractor will be delegated a portion of a project’s utilization goal. In such event, it will be required to develop its own MWBE Utilization Plan. It must obtain a certain amount of allocated “MWBE credit” for dollars spent. This Utilization Plan will, in time, be incorporated into the prime contractor’s MWBE Utilization Plan.

Unless the subcontractor is itself an MWBE entity, the way a subcontractor will fulfill its portion of the utilization goal is through the purchase of construction materials and supplies. However, as of April 1, 2016, there has been a significant shift in policy in New York State as it relates to the counting of MWBE credits for “brokers” and “suppliers.” For suppliers, credit may now only be claimed for 60% of the dollars spent. For brokers, credit may now only be claimed for the actual dollar value of the commission received by the broker.

This new policy applies only to contracts entered into on or after April 1, 2016. All prior, active contracts will be credited under the old policies, unless you renew, amend or extend the contract on or after April 1, 2016. In such case, you must perform a new goal assessment, though it is likely that the new broker/supplier policy would only apply to the renewed, extended or amended contracts.

Prior to this change, which seems to mirror the Federal DBE rules, New York State would credit 100% of the dollar value of a supply contract performed by an MWBE. For brokers, while certain state agencies may have formerly issued credits for dollar values slightly differently before April 1, 2016, a number of agencies would previously credit 60% of the dollar value of a broker contract performed by an MWBE.

So the important question becomes ‘what is the difference between a broker and a supplier?’ NYS Empire State Development’s Division of Minority and Women Business Development defines a “broker” and a “supplier” as follows:

BROKER: A firm is classified as a broker when the firm fills orders for a third party by ordering, and/or purchasing, and/or receiving supplies from a third party supplier rather than out of its own existing and flowing inventory and, in light of the standard industry practices, provided no substantial services other than acting as an intermediary between supplier and customer. (emphasis added).

SUPPLIER: A business enterprise is classified as a supplier when the firm can demonstrate that it owns, operates, and maintains a significant store or warehouse in which materials, supplies, articles or equipment are bought, kept in stock, and regularly sold or leased in the usual course of business. The firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question. Manufacturers can be classified as suppliers. (emphasis added).

When assessing whether an entity is a broker or supplier, it is essential to keep in mind what the ‘commercially useful function’ of that entity is. New York State considers an MWBE to have performed a ‘commercially useful function’ when, among other things, “it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing and supervising the work involved.”

Based upon the definitions of a “broker” and a “supplier,” there are several requirements that an entity must satisfy in order to be classified as a supplier (e.g. owns, maintains and operates a significant store or warehouse). Additionally, given the pronouncement in the definition of “supplier” that “[m]anufacturers can be classified as suppliers,” subcontractors must be even more vigilant to make sure that the correct credits are being claimed. This is particularly unsettling given the fact that, prior to April 1, 2016, New York State treated manufacturers and suppliers the same, crediting 100% of the dollar value of the contract performed. However, after April 1, 2016, while 100% credit may be claimed for the dollar value of contracts performed by manufacturers, only 60% credit may be claimed for the dollar value of contracts performed by suppliers. For example, it is unclear whether a “manufacturer’s representative” would be classified as a manufacturer or a supplier, and whether 100% or 60% credit could be claimed.

Commentary

It is essential to perform due diligence, including site visits, when dealing with an alleged supplier to ensure that the supplier actually meets the definition of supplier, as opposed to a mere broker, such that the correct credit is claimed in any Utilization Plan. Additionally, if a subcontractor is responsible for obtaining credits toward the MWBE goals on a project, it is crucial to have a substantiated basis for classifying an entity as a supplier, and ensuring that the entity is performing a “commercially useful function” on a project.

Moreover, the status of an entity may change from time to time. Therefore, a search should be performed on your proposed supplier as close to your Utilization Plan submittal as possible to verify the status of your potential manufacturers, suppliers or, as the case may be, brokers. The ability of a subcontractor to claim, and obtain, credit for a proposed MWBE participant will depend on an entity’s status at the time of submission of the Utilization Plan. In order to protect itself from a later claim that MWBE credits were claimed which a subcontractor was not entitled to claim, due diligence at every step of the process is key.

Henry L. Goldberg may be contacted by email, hlgoldberg@goldbergconnolly.com or by telephone, 516-764-2800.

©Goldberg & Connolly 2016

This article has been prepared for informational purposes only. It is not a substitute for legal advice addressed to particular circumstances. You should not take or refrain from taking any legal action based upon the information contained herein without first seeking professional, individualized counsel based upon your own circumstances. The hiring of a lawyer is an important decision that should not be based solely upon advertisements. Before you decide, ask us to send you written information about our qualifications and experience.