

K N O W L E D G E

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THE

BLACK

INSTITUTE

Not Good Enough:

The Myth of
'Good Faith and
Best Efforts'

Non-
M/WBEs

96%

M/WBEs
4%

*Report on Minority-
and Women-Owned
Businesses*

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Designed by The Advance Group

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Executive Summary

Over the past decades, minority- and women-owned business enterprises (M/WBEs) have grown into an economic force to be reckoned with. According to the latest available data of the U.S. Census' Survey of Business Owners, in 2002-2007, the number of minority-owned businesses (MBEs) in the country grew by 45.5 percent - from 4 to 5.8 million - to 21 percent of the total. Meanwhile, the number of women-owned businesses (WBEs) grew from 6.5 to 7.8 million, amounting to almost 30 percent of the total businesses in the country. While the number of workers employed by MBEs and WBEs grew more slowly than the number of firms, they too, at 5.8 and 7.6 million respectively, added up to 23 percent of all private firms' employees.¹

This growth would have remained but a dream without the decades of minorities' struggle for equal economic opportunity, which is rooted in the history of the Civil Rights movement. This struggle enabled the passage of federal, state, and city-level legislation, as well as executive decisions that established numerical goals, with various degrees of stringency, for M/WBE participation in government contracting and subcontracting opportunities. The first such goal, on the federal level- of "at least 10% of federal funds granted for local public work projects,"- was set by the 1977 Public Works Employment Act. At the state level, affirmative procurement programs started in 1972-73 with Mississippi and Connecticut and grew to 25 more states by 1995.² New York State, however, was a latecomer to this process: its first M/WBE legislation was enacted in 1988 -when the tide was about to turn, largely because of the lawsuits claiming that M/WBE preferences violated the 14th Amendment.

In 1990s, many of the pro-M/WBE policies in various cities and states across the country were rolled back under the pressure stemming from court decisions. In 1994, New York City Mayor Giuliani abolished the city program which was resurrected in a very limited way in 2005. In 1996, voters in California enacted Proposition 206 which required the state to abandon its mandatory M/WBE participation goals.

According to the official data, over the past ten years, New York State has managed to catch up and even take the lead in M/WBE contracting nationwide. Thus, in 2005-06 fiscal year, M/WBE procurement in NYS was merely 5 percent - lagging behind not only Florida, Illinois, and Maryland, with their 22-25 percent rates, but also behind both Carolinas and Texas. Meanwhile, the Disparity Study released in 2010 indicated that the availability of MWBEs for state contracts was close to 29 percent. In 2011, Governor Andrew Cuomo set MWBE participation goal for state contracts at 20 percent. By the end of the 2013-14 fiscal year, according to the Governor's office, New York jumped ahead of the rest of the country, with over 25 percent, or \$1.96 billion in contracts awarded to MWBEs; however, as noted by a number of observers, detailed data have been either too difficult to access or altogether unavailable. For 2014-15, the goal is set at 30 percent, or \$2.4 billion.³

Yet undoubtedly positive effects of this increase in contracting are not distributed equitably across the M/WBE world - and some are even diverted from it as a result of fraud. The most egregious example of this latter is the so-called "Men in Skirts" phenomenon: white males placing their wives, daughters, or other family members in the forefront of a business just to reap the benefits that have been allocated for M/WBEs by government programs.

¹U.S. Census Bureau, 2007 Survey of Business Owners Summaries of Findings, 'Survey of Business Owners - Company Summary: 2007,' <https://www.census.gov/econ/sbo/getsof.html?07cosum>, and 'Survey of Business Owners - Women-Owned Firms: 2007,' <https://www.census.gov/econ/sbo/getsof.html?07women>.

²INSIGHT Center for Community and Business Development, 'State Policies and Programs for Minority- and Women-Business Development,' 2007/<http://www.insightccd.org/uploads/publications/assets/50%20state%20inclusive%20business%20policy%20scan.pdf>, p. 34.

³ Governor Andrew Cuomo, '2015 Opportunity Agenda: Restoring Economic Opportunity,' <https://www.governor.ny.gov/news/2015-opportunity-agenda-restoring-economic-opportunity-5>.

Even without it, M/WBEs still face many obstacles to their success and even survival, including:

- Weak legal guarantees against discrimination in the absence of M/WBE's mandatory inclusion in public contracting;
- Lack of information transparency in the contract bidding process;
- Certification hurdles;
- Exclusion of so-called "sole source" or specialty contracts, from M/WBE participation requirements by New York State and City laws and Community Benefit Agreements;
- Flawed contract agreements due to the lack of access to good legal counsel;
- Barriers in access to start-up capital;
- Payment delays by larger contracting entities;
- Concentration of opportunities in the hands of a few already long-established M/WBE contractors, some of which cannot be really considered disadvantaged any longer;
- Restrictive definitions of 'minority' in disparity studies and, consequently, in legislation, which exclude some disadvantaged groups, such as Arabs or immigrants from non-English-speaking countries.
- Lack of a 'central address,' such as a Chief Diversity Office, in NYC Government for dealing with M/WBE issues, i.e. of an office with exclusive responsibility for them.

In order to explore these challenges and develop appropriate solutions, TBI conducted interviews with individuals at the forefront of the struggle for M/WBE success. Interviewees outlined the issues that they had faced and offered solutions that, if implemented, may, in our opinion, play a transformative role in how M/WBEs are treated by non-M/WBE businesses and government. These solutions are presented below.

Demands for Economic Justice: What is to be Done for M/WBE Success⁴

- New York State and New York City governments must establish M/WBE contracting requirements that provide for a mandatory inclusion of 35 percent of the total contracting budget; likewise, "second-tier" contracting, i.e. subcontracting by larger firms that have contracts involving taxpayer dollars, should have a mandated minimum of 35 percent of M/WBE participation.
- Chapter 862 of New York State Laws of 1990 and New York City Local Law 1 must be amended to provide equitable access for M/WBEs to 'sole source' or 'specialty' contracting opportunities.
- Federal Government must encourage the establishment of Chief Diversity Officer positions, along the lines of the New York State and New York City Comptroller's Office positions, in other cities and states that have set goals for M/WBE participation. Chief Diversity Officers are needed to supervise M/WBE-related programs, ensure their access to necessary resources, and stay on top of essential M/WBE needs. To maximize efficiency, these officials' duties should be entirely focused on M/WBEs.

⁴ For the list of amendments proposed by us for NYC Local Law 1 of 2013, see Exhibit B.

- NY State and NYC Chief Diversity Officers must monitor M/WBE contracts to ensure that they are being upheld by all parties and that M/WBEs are actually completing their assigned work to minimize the chances of contractors signing M/WBEs on to projects only to pass the contracts over to other businesses half way through to complete the job.
- New York State and New York City contracting offices must revamp the bidding process to maximize openness and transparency in access to information about available government projects from the very start of the process, i.e. before their approval.
- Any for-profit company that is granted tax privileges or breaks from city or state government must be subject to legal requirements of M/WBE participation in the subcontracting of any of its projects. (Thus, the definition of the “bidder” in NYC Local Law 1 of 2013, §6-129 (c)(4) must be amended to include any individual or entity seeking to be in a contract with the City involving public spending, public funding, and/or public incentives, including tax credits or waivers through which the City forgoes its normal taxes and fees).
- NYC Local Law 1 of 2013 must also be amended to establish M/WBE requirements for all city agencies, authorities, commissions, etc. (as opposed to the 34 mayoral agencies currently covered by the law).
- DMWBD and SBS must provide legal and other assistance to M/WBE contractors whose payments are delayed. The State’s Prompt Payment Law passed in 1998 seems not to be well implemented or not sufficient, given that payment delays are the most frequently mentioned by M/WBE owners as a key problem. Payment must be given no later than 60 days into the project. Contracting agencies should be assisted with getting rid of their bad habits of not paying on time or in a reasonable manner. NYC should consider adopting the Los Angeles practice of withholding payment from prime contractors for non-payment of their subcontracting obligations.
- New York State and New York City legislatures must address the lack of M/WBEs start-up capital by instituting the use of 1 percent of NY State and City pension funds to provide a funding pool for M/WBEs from which they would be eligible to obtain a loan or a grant for the period of waiting for their contract payment to arrive.
- New York State and City authorities must include representatives of minorities’ and women research institutions among other key stakeholders in developing M/WBE policies, including drafting recommendations for the upcoming State and City Disparity Studies.
- NYC Mayor’s Office must establish an M/WBE Advisory Council comprising all key stakeholders. The Advisory Council must be involved with the work on the City Disparity Study, by providing input from the beginning to the end of the process.
- Data and statistics on MWBE participation must be made more transparent and easily accessible to the general public, as well as more detailed. This includes the breakdown of WBEs and their participation rates by race and ethnicity. NYC Mayor’s Office must issue an annual report on the state of M/WBEs in the city.
- In addition, New York State and New York City governments must include a larger educational component in their M/WBE assistance programs, to help new companies reduce their learning curve. This educational component should involve the more successful and established M/WBEs in the mentorship system, more extensively than under SBA’s currently existing Mentor-Protégé Program. State and city agencies should institute a system of recognition and rewards for established M/WBEs that partner with the younger generation to share their experience and help them grow.

Introduction

M/WBEs: Recent history, regulatory framework, and barriers to success

Minority and women-owned business enterprises (M/WBEs or MWBEs) have been around for centuries. (One of the first, if not the first, MBE owners in the United States was Paul Cuffe or Cuffee (1759-1817), the son of an African slave father and a Native American mother. He went from farming to owning a fleet of ships and being likely the wealthiest Black and Native American in his time. Other prominent M/WBE pioneers in the 18th and 19th century included Free Frank, William Leidesdorff, Clara Brown, Isaac Myers, and the founders of North Carolina Mutual Insurance Co.⁵) And yet M/WBEs became the subject of legislation and government policies only since the 1960s.⁶ The purpose of the M/WBE-related laws and policies was to equalize the opportunities between these firms and non-M/WBE businesses.

M/WBE regulations and policies can be broken down into state, city, and federal levels. Across these levels, there are similarities as well as differences in the way that M/WBEs are regulated and managed. The laws and policies of individual states may provide opportunities for M/WBEs that the federal or city regulations do not offer, and vice versa. Finding out what works in a specific jurisdiction may be beneficial because it may be put to use in another jurisdiction in order to stimulate more positive M/WBE outcomes there.

At the federal level, the most important milestones of M/WBE legislation included: the Small Business Act of 1958 requiring assistance to “socially and economically disadvantaged” small businesses (§8a); President Nixon’s Executive Orders of 1969 and 1971 creating the Office of Minority Business Enterprises and requiring federal agencies to assist them; the 1977 Public Works Employment Act, that introduced the first numerical goal for minority-owned businesses’ participation in federal procurement contracts, requiring municipalities and states to allocate “at least 10% of federal funds granted for local public works projects . . . to procure services or supplies from businesses owned by minority group members”; 1978 amendments to §8a that established the presumption of social disadvantage for Blacks, Hispanics, and Native Americans (expanded in 1980 to Asian Pacific Americans and in 1987 to women); and, finally, under the Obama Administration, the creation of special inclusion-oriented offices at the Federal Reserve and Securities Exchange Commission, as well as the launch of the Women-Owned Small Businesses (WOSB) Federal Contracts Program.⁷

⁵ See Juliet E.K. Walker, *The History of Black Business in America: Capitalism, Race, Entrepreneurship*, Volume 1 (UNC Press Books: 2009).

⁶ The first executive orders to promote MBEs, as well as to provide financial assistance to public and private organizations that give them technical and management assistance were issued by President Nixon in 1969 and 1971. In 1977, the Public Works Employment Act of the Carter administration called for 10 percent of federal funds for public works projects to be directed toward the procurement of services and products from M/WBEs. See Pennsylvania Advisory Committee to The U.S. Commission on Civil Rights, ‘Barriers Facing Minority- and Women-Owned Businesses in Pennsylvania,’ 2002, p.x, <http://www.usccr.gov/pubs/sac/pa0802/pa0802.pdf>.

⁷ Some of this historical overview is based on ‘Disadvantaged Business Enterprise Programs-the Legal Landscape—A Brief Outline,’ <http://apps.americanbar.org/buslaw/newsletter/0060/materials/f1.pdf>.

At the state level, affirmative procurement programs started in 1972-73 with Mississippi and Connecticut and grew to 25 more states by 1995.⁸ New York State, however, was a latecomer to this process: its first M/WBE legislation, Article 15-A of Executive Law, was enacted in 1988 by Governor Mario Cuomo – at the time when the tide was about to turn, largely because of lawsuits claiming that M/WBE preferences violated the 14th Amendment. In 1989, the U.S. Supreme Court ruling in *City of Richmond v. J.A. Croson*, known as *Croson*, required every jurisdiction to prove discrimination against specific groups prior to introducing or renewing M/WBE contracting preferences. This led to the emergence and rapid growth of the business of economic disparity studies, commissioned on a regular basis by state and city governments and other entities. These studies themselves have recently been challenged, not least because of the perception of the field being monopolized by a few organizations, as well as recent revelations of a massive abuse of the copy-and-paste routine in the production of these studies by the Austin-based NERA Economic Consulting (responsible for NY State's first and most recent Disparity Studies, among many others).

In New York, M/WBEs are regulated by state and city laws that were intended to assist in M/WBEs' advancement. These laws include:

- In New York State - Article 15-A of Executive Law ("Participation by Minority Group Members and Women With Respect to State Contracts"), which is subject to periodic renewal and will be technically expiring, unless renewed, by 12/31/2016;⁹
- In New York City – Local Law 1 of 2013 ("opportunities for minority and women owned business enterprises and emerging business enterprises in city procurement"), which includes and supersedes Local Law 129 of 2005.

These laws put in place programs to assist M/WBEs, including: NYS' Division of Minority and Women's Business Development (created under Article 15-A) and Empire State Development's Procurement Assistance Program (although not specifically geared toward M/WBEs only); New York City Council's funded M/WBE Leadership Association; and others.

⁸ INSIGHT Center for Community and Business Development, 'State Policies and Programs for Minority- and Women-Business Development,' 2007, <http://www.insightccd.org/uploads/publications/assets/50%20state%20inclusive%20business%20policy%20scan.pdf>, p. 34.

⁹ <http://public.leginfo.state.ny.us/lawssrch.cgi?NVLWO>: The expiration date was initially set to 12/31/2018 but amended by State Law S.8314/A.11527, signed by then-Gov. David Paterson on 17/9/2010.

However, evidence suggests that even with these laws and agencies in place, M/WBEs still endure difficulties that non-M/WBEs do not. And while M/WBEs seem to have enjoyed some gratification in terms of the number of new jobs created by these companies, and thus their success is clearly beneficial to the economy as a whole, there is still a stigma attached to these businesses in the wider society that seems to hinder their performance.

In 2010, as required for the renewal of the Article 15-A provisions, NY State Department of Economic Development commissioned another report on M/WBEs that was prepared by NERA Economic Consulting.¹⁰ Commonly referred to as 'The 2010 Disparity Study,' it outlined the many inequalities that persist between M/WBEs and traditional firms and provided fresh evidence of the latter's unfair economic advantage.

NYC's Local Law 1 of 2013 removed the 1 million dollar cap on construction, professional services, and standard services procurement for which goals for participation by M/WBEs may be established by the City's M/WBE Program. However, that did not mean that more M/WBEs "would" be hired for contracts that were 1 million dollars or more, it just meant that they "could" now be hired. In other words, it was a door being opened, but M/WBEs still had to be invited in. Contracting discrimination was and is still prevalent, making it hard for M/WBEs to succeed.

The first step toward developing solutions that can positively affect M/WBEs is to recognize the challenges, and for this we need to know exactly what they are. This is a key objective of the present report, in line with The Black Institute's emphasis on knowledge/research, as an integral part of our "action tank" strategy.

What is a Minority-Owned Business? Definitions and Their Limits

The 2007 Survey of Business Owners by US Census defined minority-owned businesses as "firms in which blacks, American Indians and Alaska Natives, Asians, Native Hawaiians and Other Pacific Islanders, or Hispanics own 51 percent or more of the equity, interest or stock of the business."¹¹ NY State Executive Law defines minority as membership in one of the following groups: "(a) Black persons having origins in any of the Black African racial groups; (b) Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American of either Indian or Hispanic origin, regardless of race; (c) Native American or Alaskan native persons having origins in any of the original peoples of North America. (d) Asian and Pacific Islander persons having origins in any of the Far East countries, South East Asia, the Indian subcontinent or the Pacific Islands."¹² NYC's Local Law 1 of 2013 defines minorities as "Black Americans; Asian Americans, and Hispanic Americans, provided that the commissioner [of small business services] shall be authorized to add additional groups to this definition upon a finding that there is statistically significant disparity between the availability of firms owned by persons in such a group and the utilization of such firms in city procurement."¹³

¹⁰"The State of Minority- and Woman-Owned Business Enterprise: Evidence from New York," April 29, 2010, http://www.esd.ny.gov/M/WBE/Data/NERA_NYS_Disparity_Study_Final_NEW.pdf.

¹¹ "Census Bureau Reports Number of Minority-Owned Firms Increased at More Than Double the Rate of All U.S. Businesses From 2002 to 2007," http://www.census.gov/newsroom/releases/archives/business_ownership/cb11-103.html.

¹² §310.8 [http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=\\$\\$EXC310\\$\\$@TXEXC0310+&LIST=LAW+&BROWSER=BROWSER+&TOKEN=52636287+&TARGET=VIEW](http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=$$EXC310$$@TXEXC0310+&LIST=LAW+&BROWSER=BROWSER+&TOKEN=52636287+&TARGET=VIEW).

¹³ Administrative Code of the City of New York, § 6-29 (c) 21, <http://www.nyc.gov/html/ddc/downloads/pdf/obo/law05129.pdf>.

As can be seen, each of these definitions fails to include some of those who are generally viewed as minorities: thus, New York City law 129 excludes non-Americans, i.e. recent immigrants; the State Law, by listing Puerto Ricans, Dominicans, and Cubans only, seems to exclude all other natives of the Caribbean; and both state and city laws exclude Arabs and others of Middle Eastern origin, as well as non-Black Africans. As a result, existing M/WBE laws failed to cover all of the economically disadvantaged groups. With these limitations in mind, NYC's Local Law 12 of 2006 introduced the category of "emerging business enterprises," defining them as owned by persons who "have demonstrated, in accordance with regulations promulgated by the commissioner, that they are socially and economically disadvantaged."¹⁴ However, as will be discussed in another section, this solution has been ineffective in practice in terms of equalizing opportunities for the typically disregarded, smaller disadvantaged groups.

M/WBEs' Share and Role in the Economy

In their presentation to the New York State Association for Affordable Housing Pre-Conference Panel, Robinson & Cole, LLP, list the following four reasons for why minority businesses are important: they are "economic drivers of communities of color; lead to reductions in national unemployment and poverty rates; as our nation becomes more diverse, we need to ensure that M/WBE businesses are fairly represented"; and "disparity studies have found that they do not win their fair share of public procurement dollars."¹⁵

The latest data on M/WBEs nationwide was collected in 2007 by U.S. Census' Survey of Business Owners, which was a part of the Economic Census. Its data sets were released in 2011 and provide a nearly complete picture of ownership by gender, ethnicity, and race – with the exception of "publicly held and other firms not classifiable by gender, ethnicity, race, and veteran status": these firms comprised 3 percent of the total. (The release of the data from the next survey, completed in November 2014, is scheduled to begin in June 2015.)

According to the Summary of Findings from the 2007 Survey, "women owned 7.8 million nonfarm U.S. businesses ... an increase of 20.1 percent from 2002." These firms "accounted for 28.7 percent of all nonfarm businesses in the United States." However, they only employed 7.6 million persons (6.4 percent of total employment) and generated a mere \$1.2 trillion in receipts (3.9 percent of all receipts) – a clear indicator that many of these firms were struggling.

¹⁴ Section 1.5(c) https://stateinnovation.org/uploads/asset/asset_file/1993/2013_New_York_Local_Law_1.pdf. The definition of "disadvantaged" is further clarified in the Emerging Business Enterprise Certification Application, p.3-4, http://www.nyc.gov/html/sbs/nycbiz/downloads/pdf/summary/certification/EBE_Certification_Application.pdf.

¹⁵ Robinson and Cole, LLP, 'NYSFAH Pre- Conference Panel: Expanding Opportunities to Minority and Women Owned Business Enterprises ("W/MBE")', May 13, 2014, <http://nysafah.org/cmsBuilder/uploads/nysafah-pre-conference-presentation-all-presentations.pdf>.

Of the **women-owned businesses** covered by the survey, almost 32 percent were “in the repair, maintenance, personal, and laundry services” as well as “health care and social assistance.” Women-owned businesses comprised 45.2 percent of all firms operating in these sectors.

In geographic terms, California had the largest share – 1 million, or over 13 percent - of all women-owned businesses in the country, and even a larger share of revenues - \$181 billion, or over 15 percent of all receipts by women-owned businesses in the country. Texas followed suit, with 610,162 women-owned businesses (7.8 percent of the total), with receipts of \$96.3 billion (8.1 percent of the total). New York was in the third place, with 594,421 women-owned U.S. firms (7.6 percent) and receipts of \$84.0 billion (7.1 percent).¹⁶

As for **minority-owned firms**, they “numbered 5.8 million, up from 4.0 million in 2002, an increase of 45.5 percent, more than double the 17.9 percent increase for all U.S. businesses ... Receipts of minority-owned firms increased 55.0 percent to \$1.0 trillion over the five-year period, compared with the 32.9 percent increase for all businesses nationwide. In 2007, more than one-fifth (21.3 percent) of the nation’s 27.1 million firms were minority-owned.

Of the 5.8 million minority-owned firms, 766,533 had paid employees, an increase of 21.7 percent from 2002. These firms employed 5.8 million people, a 24.4 percent increase from 2002, and their payrolls totaled \$164.1 billion, an increase of 42.2 percent. ... minority firms with no paid employees (nonemployers) numbered 5.0 million, an increase of 50.0 percent from 2002.”

The State of Hawaii led in the share of minority-owned businesses nationally, with nearly 59 percent of its firms minority-owned. District of Columbia came out second, with minority-owned businesses comprising over 40 percent of its firms. It was followed by California, with 35.6 percent. New York State was clearly lagging behind, with only 27.5 percent of all its businesses minority-owned by the Survey definition, and slightly over 30 percent owned by women; New York City, however, was faring better, with close to 43 percent (over 400,000) of its businesses minority-owned, and over 32 percent (more than 300,000) owned by women.

“Minority-owned businesses in Hawaii generated \$20.6 billion in receipts (2.0 percent of Hawaii’s total business receipts), while minority-owned businesses in Washington, DC, and California, generated \$5.0 billion (0.5 percent of Washington, DC’s total business receipts) and \$283.7 billion (27.7 percent of California’s total business receipts), in receipts, respectively. Among U.S. counties, Los Angeles County, California, had the largest number of minority-owned businesses in 2007, numbering 466,312 businesses (8.1 percent of the nation’s minority-owned businesses). Miami-Dade County, Florida, was second, with 286,596 minority-owned businesses (5.0 percent of the nation’s minority-owned businesses), and Harris County, Texas, was third, with 169,381 minority-owned businesses (2.9 percent of the nation’s minority-owned businesses).”

The Survey identified 1.2 million businesses that were owned by Hispanic men; these comprised 4.5 percent of all the firms in the country, but earned only \$256.4 billion in receipts - 0.9 percent of all the firms’ revenues. “Men-owned firms that were equally owned by Hispanics and non-Hispanics accounted for 26,926 businesses (0.1 percent of the nation’s businesses), with \$19.6 billion in receipts (0.1 percent of the nation’s revenues).” “Hispanic women-owned businesses numbered 787,914 (2.9 percent of the nation’s businesses) and earned \$55.7 billion in receipts (0.2 percent of the nation’s receipts). In addition, women-owned businesses that were equally owned by Hispanics and non-Hispanics accounted for 8,698 businesses (less than 0.1 percent of the nation’s businesses) and earned \$1.4 billion in receipts (less than 0.1 percent of the nation’s receipts).” “Hispanic-owned businesses that were equally owned by men and women numbered 244,871 businesses (0.9 percent of the nation’s businesses), earning \$38.6 billion in receipts

¹⁶ “Survey of Business Owners - Women-Owned Firms: 2007,” <https://www.census.gov/econ/sbo/getsof.html?07women>.

¹⁷ United States Census Bureau, ‘Census Bureau Reports Number of Minority-Owned Firms Increased at More Than Double the Rate of All U.S. Businesses From 2002 to 2007,’ https://www.census.gov/newsroom/releases/archives/business_ownership/cb11-103.html

(0.1 percent of the nation's receipts). In 2007, there were 207,123 businesses (0.8 percent of the nation's businesses) that were equally owned by men and women and also equally owned by Hispanics and non-Hispanics. These businesses earned \$35.0 billion in receipts (0.1 percent of the nation's receipts). Minority men-owned businesses numbered 2.9 million (10.7 percent of the nation's businesses), earning \$710.8 billion in receipts (2.4 percent of the nation's receipts). Minority women-owned businesses numbered 2.2 million businesses (8.2 percent of the nation's businesses), earning \$186.2 billion in receipts (0.6 percent of the nation's receipts).

Wholesale and retail trade accounted for 39.7 percent of the receipts earned by the nation's minority-owned businesses. In 2007, 30.0 percent of the nation's minority-owned businesses operated in the repair, maintenance, personal, and laundry services and health care and social services sectors.¹⁷

The growth of M/WBEs nationally, 2002-2007

2002 Survey

	ALL FIRMS CLASSIFIABLE BY OWNER'S RACE AND GENDER, I.E. PRIVATE	MBES	% OF TOTAL	WBES	% OF TOTAL
Total business	22,480,256	2,580,417	12	6,489,259	29
Total revenues	\$8,783,541,146,000	\$505,729,062	6	\$939,538,208	11
Total paid workers	55,368,216	3,402,212	6	7,141,369	13

2007 Survey

	ALL FIRMS CLASSIFIABLE BY OWNER'S RACE AND GENDER, I.E. PRIVATE	MBES	% OF TOTAL	WBES	% OF TOTAL
Total business	26,294,860	5,759,209	22	7,792,115	30
Total revenues	\$10,900,000,000	\$1,024,801,958	9	\$1,196,608,004	11
Total paid workers	56,600,000	5,816,114	10	7,520,121	13

II. Diversity in public contracting: laws, regulations & policies

* New York State

The first law supporting M/WBEs in New York State was Article 15-A of the Executive Law, signed on July 19, 1988 by Governor Mario Cuomo. The law was made up of nine sections which

*"required State Agencies and prime contractors to State Agencies involved in construction-related trades to make effort to cause minority-owned business enterprises and women-owned business enterprises to have 'meaningful participation' and a 'fair share' of contracting opportunities involving construction, demolition and leasing real property in New York."*¹⁹

Shortly after Article 15-A became law, in 1989, the U.S. Supreme Court issued its historic ruling against minority quotas for contractors in Richmond VA, stating that any government programs that provide "specific use of employment goals for contracting or hiring" "must be founded on evidence of past discrimination" that withstands "strict scrutiny" (City of Richmond v. J.A. Croson). The ruling, which became known as Croson, subsequently shaped all state and city efforts on behalf of M/WBEs around the country, requiring them to produce studies evidencing discrimination against specific groups in order to justify any contracting preferences.

Since Article 15-A did not refer to findings of past discrimination, NY State became vulnerable to a lawsuit. Such a lawsuit was filed in 1992 against both US Department of Transportation and personally Mario Cuomo, challenging the constitutionality of both federal and NY State "set-aside for minority enterprises covering wholly state-funded highway projects" because they allegedly "denied the complaining party of the equal protection of the law."²⁶ NY State had to suspend Article 15-A (substituting it with emergency regulations) and produce a study evidencing past discrimination against M/WBEs. The study was produced by NERA Economic Consulting, an Austin-based firm. Article 15-A, along with the M/WBE program, was reinstated on the basis of its findings.



In his interview for this report, **James Heyliger, President of the Association of Minority Enterprises of New York**, provided an historical perspective on M/WBE legislation, emphasizing the role that was played by minorities' struggle to break into the construction industry: "Since there is so much money in construction, the construction industry has mobilized to keep us out. That's how the whole idea of minority-owned businesses, goals and percentages in government contracting emerged. Then came the idea of the disparity study, suppose to provide the rational for setting M/WBE participation goals and percentages."²⁰

¹⁹ Bryant Burgher Jaffe & Roberts LLP, 'A New Generation of M/WBEs for New York State: A Summary and Analysis of Recent New York Legislation for Minority and Women Business Enterprises,' 2010, p. 3-4, <http://www.bryantrabbino.com/2C0296/assets/files/News/A%20Summary%20and%20Analysis%20of%20Recent%20New%20York%20State%20Legislation%20For%20Minority%20and%20Women%20Business%20Enterprises.pdf>.

²⁰ This echoes the opinion of Arthur Fletcher, assistant secretary of labor in Richard Nixon's administration, who noted that "The craft unions and the construction industry are among the most egregious offenders against equal opportunity laws . . . openly hostile toward letting blacks into their closed circle." See 'Affirmative Action Timeline,' <http://www.infoplease.com/spot/affirmativetimeline1.html#ixzz3R0H5eCkV>.

Article 15-A established The Office (nowadays Division) of Minority and Women's Business Development (DMWBD) as a means of helping to resolve the issues that small businesses have been faced with when obtaining their certifications as well as contracts. DMWBD's objective is not only to promote the equality of economic opportunities for M/WBEs, but also to remove existing barriers that are hindering their participation in state contracts. This division has three key objectives in aiding the growth of M/WBEs:

- "To encourage and assist state agencies that are engaged in contracting activities to award a fair share of state contracts to M/WBEs;
- To review applications by businesses seeking certification as an M/WBE and to maintain a directory of certified M/WBEs;
- To promote the business development of M/WBEs through education and outreach to agencies and M/WBEs."²¹

The State also runs the Procurement Assistance Program which has the purpose of helping "New York State small businesses identify contracting opportunities with state government agencies, and find the resources needed to compete in this marketplace."²² The highlights of this program include:

- "Procurement workshops, including federal, state, and local government contracting information
- Help in identifying agencies that might purchase a company's products or services
- Assistance in learning how to be placed on bidders' lists" etc. ²³

In spite of this, reports dating back to 2007 and earlier have been outlining some of the same issues that are clearly still relevant today. Thus, in April 2007, then-Lt. Governor of NY State David Paterson told the Executive Leadership Council (a group established by then-Governor Spitzer to look into state procurement practices and "increase the utilization of qualified M/WBEs") that in 2006 M/WBEs received merely 3 percent of state contracts, out of more than \$11 billion of the state's discretionary expenditures of that year.²⁴ This was in spite of the fact that about 23% of the state's small businesses were owned by minorities, and about 26% by women.²⁵

²¹ Empire State Development. Division of Minority and Women's Business Development (DMWBD). www.esd.ny.gov/M/WBE.html.

²² NY State's Empire State Development. Procurement Assistance Program. <http://esd.ny.gov/BusinessPrograms/ProcurementAssistance.html>.

²³ Ibid.

²⁴ 'Paterson Pushes NY State M/WBE Agenda,' <http://esd.ny.gov/M/WBE/Data/News/April25.pdf>.

²⁵ 2010 Innovation Awards Application, <http://ssl.csg.org/innovations/2010/2010applications/2010EastapplicationsinPDF/10E13NYITSUPPLIER.pdf>, p. 2.

Article 15-A, under § 312-a, directs the head of DMWBD to commission (on a regular basis, as part of the process of renewing the article) "a statewide disparity study regarding the participation of minority and women-owned business enterprises in state contracts" for the State government, to be prepared by an independent entity through the RFP process. The next study is due by 2/15/2016. The price tag for the New York State study currently stands at \$250,000. The latest such study, commissioned by NY State Department of Economic Development (Empire State Development), and prepared, again, by NERA under the direction of Dr. Jon Wainwright, is widely referred to as The 2010 Disparity Study. The study, whose purpose was to "examine the difference between the availability of M/WBEs and their utilization in government procurement," found that "M/WBEs in New York State are present in substantially lower number, earn substantially less and are substantially more likely to be denied access to credit than would be the case if the market operated in a neutral manner with respect to race and gender."²⁷

The study provided the following estimates of the M/WBE availability at the time, by major procurement category and overall:

Detailed industry	African American %	Hispanic %	Asian %	Native American %	MBE %	Non-minority Female %	M/WBE %	Non-M/WBE %
Construction	4	6.94	3.18	0.21	14.33	8.41	22.74	77.26
Construction–related professional services	3.19	4.66	4.46	0.9	13.21	11.32	24.53	75.47
Services	3.5	4.19	11.56	0.35	19.6	17.44	37.04	72.95
Commodities	3.66	4.64	7.45	0.37	16.12	10.93	27.05	72.95
TOTAL	3.71	5.41	7.08	0.33	16.53	12.39	28.92	71.08

The study identified numerous barriers that have impaired access by M/WBE to state contracting. Under the section on "Statistical disparities that focus on both minority and female business formation and business owner earnings", the study summed up its findings by stating that

*"current M/WBE availability levels in the New York State market area ... are substantially lower than those that we would expect to observe if commercial markets operated in a race and gender neutral manner... In other words, minorities and women are substantially and significantly less likely to own their own businesses as the result of marketplace discrimination than would be expected based upon their observable characteristics, including age, education, geographic location and industry. We find that these groups also suffer substantial and significant earnings disadvantages relative to comparable non-minority males, whether they work as employee or entrepreneurs."*²⁸

²⁶ Harrison & Burrowes Bridge Constructors, Incorporated v. United States Department of Transportation v. Mario M. Cuomo, 981F. 2d. 50 (1992).

²⁷ Office of the State Comptroller. Division of State Government Accountability, "Taking Affirmative Action to Improve New York State's M/WBE Program." <http://www.osc.state.ny.us/reports/other/M/WBE-research-brief2010.pdf>, p.2.

²⁸ NERA Economic Consulting, "The State of Minority- and Woman-Owned Business Enterprise: Evidence from New York," April 29, 2010, http://www.esd.ny.gov/M/WBE/Data/NERA_NYS_Disparity_Study_Final_NEW.pdf.

As summarized by the Office of NYS Comptroller,

"The study further found that during State fiscal years 2004 and 2008, M/WBEs were utilized in State contracts at rates far lower than their availability would indicate. Although 29 percent of firms were identified as M/WBEs in the study, only 5 percent of New York's contracting and purchasing dollars were spent with M/WBE firms from 2004 through 2008. The study concluded that the statistical and anecdotal evidence supports the conclusion that these outcomes are the result of discrimination."²⁹

The study also discovered that "M/WBEs that have been hired in the past by non-M/WBE prime contractors to work on public sector contracts with M/WBE goals are rarely hired- or even solicited- by these prime contractors to work on projects without M/WBE goals."³⁰ In the words of the study,

"the relative lack of M/WBE hiring and, moreover, the relative lack of solicitation of M/WBEs in the absence of affirmative efforts by NY and other public entities in the New York State market area shows that business discrimination continues to fetter M/WBE business opportunities in the State' relevant markets."³¹

Later in the same year, the Office of the New York State Comptroller Tom Di Napoli's Division of State Government Accountability produced its own 'Research Brief' – that echoed the Disparity Study's broad systemic perspective on M/WBE challenges, as part of the overall disadvantages facing minorities and women, whether as entrepreneurs or as workers:

"Despite the collective efforts of minority and women owned business enterprise (M/WBE) programs at the federal, state, and local levels, minorities and women are still significantly disadvantaged in both the workplace and the marketplace. U.S. Census Bureau data show that minorities and women earn substantially less from their labor- as both employees and as entrepreneurs - than their non minority male counterparts. This is true both in New York and in the nation as a whole."³²

The Comptroller's Office outlined other issues that minority businesses still face, such as "problems with vendor certification, goal setting, program results, reporting, program oversight and outreach efforts."³³ These and other barriers are preventing them from being able to reach a level of prosperity that would, in turn, have a significant impact on their communities. In NY State Comptroller's Office press release on the occasion of the Research Brief publication, it was noted that "New York is making slow progress in broadening M/WBE involvement but this report makes it clear that much more could be done. New York needs to make M/WBE a more integral part of its procurement process."³⁴ The press release states that:

"While minority-owned firms in New York account for 25 percent of all businesses, they earned less than three percent of total sale and receipts. Similarly, women head 30 percent of New York's firms but earn only four percent of sales and receipts. Combined, women and minority-owned firms received only five percent of State agency contract dollars on average between 2004 and 2008."³⁵

²⁹ See footnote 27.

³⁰ See footnote 28.

³¹ Ibid.

³² See footnote 27.

³³ Ibid.

³⁴ Thomas P. DiNapoli, 'DiNapoli: M/WBE Firms Do Not Get Fair Share of Contracts: Audits, Report Show Persistent Problems With Current Program,' October 8, 2010, www.osc.state.ny.us/press/releases/oct10/100810a.htm.

³⁵ Ibid

Following the publication of the Disparity Study and the adoption of its findings by state legislature, Article 15-A and related laws were amended, effective October 2010. Specifically, the new legislation:

- changed the legal definition of M/WBEs so as to restrict it to small businesses only and to those whose owners' personal net worth, i.e. after subtracting liabilities, was no more than \$3.5 million (adjusted annually for inflation and excluding certain assets, such as the individual's primary residence, equity interest in the M/WBE firm, some retirement accounts for up to \$500,000), in order to make sure that the program works in accordance with its intent, i.e. serves those businesses that are truly disadvantaged due to the characteristics of their owners;
- extended the scope of the program from real estate and construction to contracts for services (including professional, such as financial) services and goods;
- created the position of NY Chief Diversity Officer reporting directly to the Governor;
- established the requirement for each State Authority to include M/WBE contract procurement data in its annual report, with comparisons of actual performance to state goals as well as details on any waivers granted and penalties assessed;
- required State agencies to consider diversity practices of contractors;
- introduced, for the first time, penalties for "willful or intentional" disregard of M/WBE participation requirements, as well as for fraud, barring the guilty party from participation in bids for one year.³⁶

Also based on the conclusions of the same study, Governor Andrew Cuomo established, by Executive Order No. 8 of 2/17/2011, an M/WBE Team, of up to 30 members, "to provide guidance for, and advice to, the Governor" in order to "address existing barriers to M/WBE participation in State contracting opportunities".³⁷ Taking a closer look at M/WBE from a state level, the Team Report outlined that securing credit was one of the biggest challenges that minority businesses faced. "The failure to secure credit limits their ability to obtain State contracts. To eliminate this barrier to growth, New York State has launched the New York State Surety Bond Assistance Program."³⁸ NYSBAP was launched by Governor Cuomo in his 2012 State of the State address. This program "provides technical and financial assistance to help contractors secure surety bonding. Contractors may be eligible to receive a guarantee of up to 30% to secure a surety bond line, bid bond or a performance and payment bond on state and city projects."³⁹

In 2011, in his first State of the State speech, Governor Cuomo established MWBE participation goal for NY state contracts at 20 percent. By the end of the 2013-14 fiscal year, official data indicated that New York State jumped ahead of the rest of the country, with over 25 percent, or \$1.96 billion in contracts awarded to MWBEs. For 2014-15, the goal is set at 30 percent, or \$2.4 billion.

³⁶For a detailed analysis of these and other changes, see 'A New Generation of MWBEs for New York State: A Summary and Analysis of Recent New York State Legislation for Minority and Women Business Enterprises,' Bryant Burgher Jaffe & Roberts LLP, <http://www.bryantrabbino.com/2C0296/assets/files/News/A%20Summary%20and%20Analysis%20of%20Recent%20New%20York%20State%20Legislation%20For%20Minority%20and%20Women%20Business%20Enterprises.pdf>.

³⁷ No. 8: Removing Barriers to Minority and Women Business Enterprises Participation in State Contracting,' <http://www.governor.ny.gov/news/no-8-removing-barriers-minority-and-women-business-enterprisesparticipation-state-contracting>

³⁸'Initiatives for M/WBE Economic Growth: New York State M/WBE Team Report,' http://www.esd.ny.gov/M/WBE/Data/M/WBETeamReport_2012.pdf.

³⁹ Empire State Development. New York State Surety Bond Assistance Program. www.esd.ny.gov/BusinessPrograms/BondingAssistance.html.

These goals and their implementation have been criticized in the media for a number of reasons - including the lack of breakdown by minority group. Critics say that some of the minorities whose companies (such as Asian-owned construction firms) count toward the State's MWBE goals in fact show no disparity with white male-owned firms. The Governor's office reportedly said that it did not even track such metrics and that Article 15-A does not allow the establishment of goals for specific industries or specific minority groups. Unlike New York City government, the State has not released any such data beyond the split between WBEs and MBEs.⁴⁰

As the February 2016 deadline for the release of yet another disparity study draws near, the credibility of these documents and their authors has become an issue that cannot be ignored. Due to the legal requirements to prove discrimination for any city or state preferential contracting program, the nationwide market for disparity studies is huge, and the number of economists working on the issue is also considerable. Yet the market has apparently been in the hands of half a dozen research agencies. One of them is NERA Economic Consulting, the source of NY State's first (1992) and latest disparity studies. Over the past 20 years, NERA was also commissioned to produce disparity studies for Austin, Cleveland, Baltimore, Boston, Chicago, Denver, Minneapolis, New Orleans, the States of Illinois, Maryland, Massachusetts, and Texas, as well as individual local agencies.⁴¹ After the City of Cleveland awarded it a \$758,000 contract for such a study, on a no-bid basis, allegedly because it was "uniquely qualified" to do it, a local newspaper discovered that the company had simply copied and pasted large chunks from one study to another, providing identical conclusions and recommendations for government agencies across the country. Even though the lead researcher on these reports was allegedly paid over \$400 per hour, and his research assistant over \$100 per hour, their copying and pasting from prior reports at times left the names of relevant locations unchanged, so that, for example, the Cleveland report ended up referring to the "Houston market area" when discussing Cleveland, which, as it turned out, resulted from the verbatim copying of a sentence from the Houston report.⁴² After this was uncovered, leaders of the local Hispanic Contractors Association and Black Contractors Association reportedly asked 200 Black and Latino contractors whether they had ever been contacted by NERA in connection with its study, and all of them said no. In the words of Norman Edwards, former president of the Black Contractors Association, currently with the American Center for Economic Equality, "Fraud has been perpetrated here. The federal government needs to come in and investigate this, and the company that got this no-bid contract needs to be held accountable. We could have used that money for jobs..." Minority contractors rallied on the steps of Cleveland City Hall in protest against the study and asked the city and federal prosecutors to investigate it.⁴³

⁴⁰ Adam Wisnieski, 'Details Murky in Cuomo's Goal for Minority Contracts,' October 8, 2014, <http://citylimits.org/2014/10/08/detailsmurky-in-cuomos-goal-for-minority-contracts/>

⁴¹ http://www.nera.com/content/dam/nera/publications/archive2/AAG_Availability_Disparity_Studies_0314.pdf.

⁴² Leila Atassi, "Cleveland awards \$758K no-bid contract to NERA, consultant which wrote nearly identical reports for others," February 15, 2013, http://www.cleveland.com/cityhall/index.ssf/2013/02/city_of_cleveland_awards_75800.html.

* New York City

In 1992, after a disparity study done by Mason Tillman Associates showed that M/WBEs were receiving 7 percent of city contracts, Mayor Dinkins' executive order directed 20 percent of city contracts to be awarded to M/WBEs, allowing their bids to be up to 10% higher than non-M/WBEs in order to win a contract. These policies led to M/WBEs' share in city purchases to rise to 17.5 percent by 1993. But the program was successfully challenged in courts; the 10 percent "bid preference" rule was invalidated by NY Supreme Court and ditched by Mayor Giuliani in 1994.⁴⁴

In 2005, following a city disparity study, Local Law 129 (LL129), enacted to enhance "opportunities for minority and women owned business enterprises in city procurement," reestablished M/WBE program in the city. Like the State law, the City law set objectives in terms of the share of city contracts to be awarded to Blacks, Asians, Hispanics, and Caucasian women. The law set the following citywide contracting participation goals, in percentages of total annual agency expenditures on such contracts:⁴⁵

BUSINESS OWNER CATEGORY	CONTRACTS UNDER \$1 MILLION				SUBCONTRACTS UNDER \$1 MILLION	
	CONSTRUCTION	PROFESSIONAL SERVICES	STANDARD SERVICES	SALE OF GOODS	CONSTRUCTION	PROFESSIONAL SERVICES
Black Americans	12.63%	9%	9.23%	7.47%	12.63%	9%
Asian Americans	No goal	No goal	No goal	5.19%	9.47%	No goal
Hispanic Americans	9.06%	5%	5.14%	4.99%	9.06%	5%
Caucasian Females	No goal	16.5%	10.45%	17.87%	No goal	16.5%

Throughout the text, the law referred to 'women-owned businesses,' but goals were set for Caucasian females' businesses only.

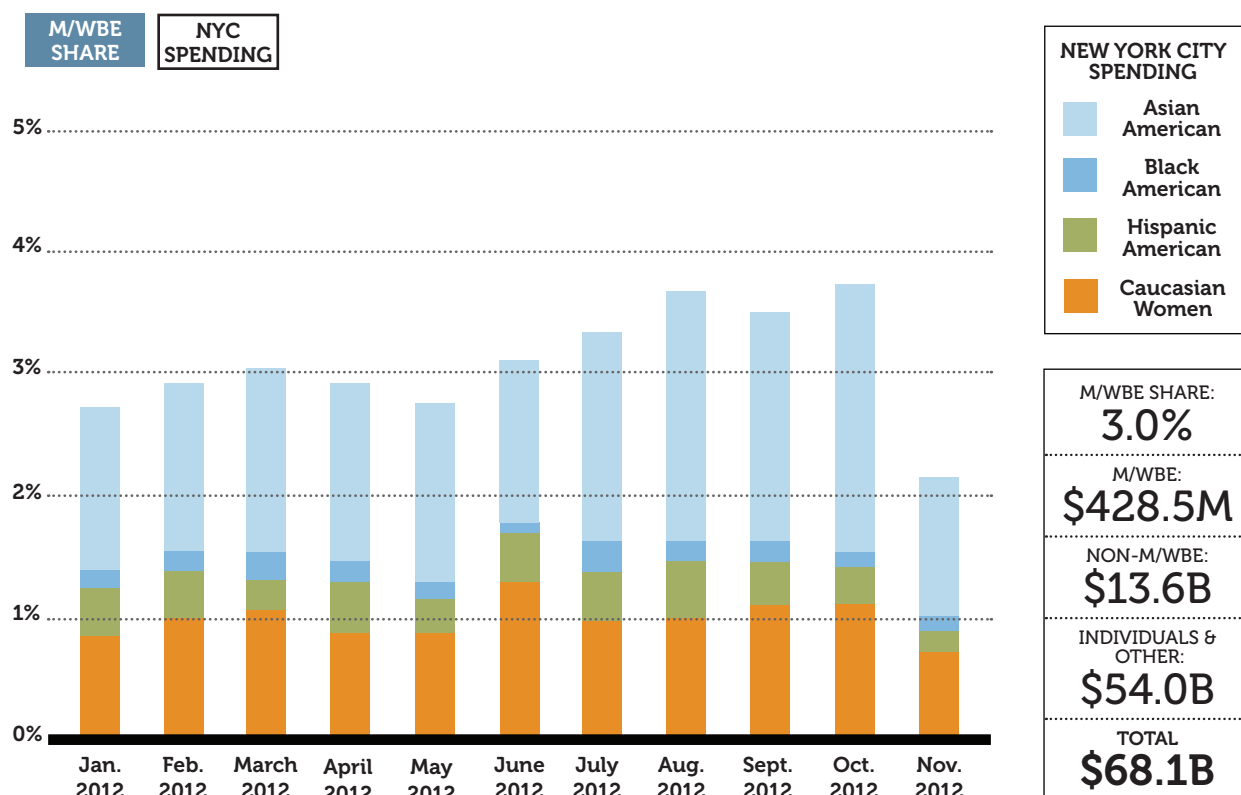
⁴³ Leila Atassi, "Cleveland minority contractor groups issue statement denouncing city's racial disparity study," February 18, 2013, http://www.cleveland.com/cityhall/index.ssf/2013/02/cleveland_minority_contractor.html.

⁴⁴ The city program was challenged in court as a violation of the 14th Amendment, particularly in its key components, such as the M/WBE Utilization Rule and the Price Preference Rule (sections 3-08 and 3-09 of Title 11 of Rules of the City of New York - "11 RCNY"). Section 3-09, in particular, permitted the City to grant a "bid preference" of up to 10% to MBEs, WBEs or joint ventures with their participation. In 1993, The Halmar Corp. sued NYC's Department of Environmental Protection over the bid preference rule, which was rescinded as a consequence of this lawsuit. § 3-09 (Price Preference Rule) was also declared invalid by NY Supreme Court, and in 1994, Mayor Giuliani rescinded it in its entirety.

⁴⁵ <http://www.nyc.gov/html/ddc/downloads/pdf/obo/law05129.pdf>.

The M/WBE Report Card, issued in 2012 by the Office of NYC Comptroller John Liu, indicated that city agencies failed to deliver on these numbers:

Citywide Analysis



Overall, in 2012, the results were 5 to 17 percentage points lower than the goals set by the law. (source: "M/WBE Report Card", New York City's comptroller, Nov. 2012)⁴⁶

The 2005 disparity study is not available online and is a library-use only item at the NYPL. Meanwhile, the city was required to conduct a disparity study in 2007 and every two years after. An investigation by CityLimits.org revealed that the 2007 and 2009 studies were never released; Miller3 Consulting, contracted to produce the 2009 study for SBS, did not complete it on time, and both SBS and MOCS did their own in-house studies which remained unpublished.

⁴⁶ Ellie Ismailidou. 'New York City Fall Short of Minority and Women Owned Business Contracting Goals,' November 18th, 2012, <http://queenscampaign.com/2012/11/new-york-city-falls-short-of-minority-and-women-owned-businesses-contracting-goals/>.

A further legislative effort was made in 2006, with Local Law 12 (LL12), which established the category of Emerging Business Enterprise, for those “economically and socially” disadvantaged businesses that could not fit into the legal definition of a minority. This law, however, failed in its implementation, as the complexities of certification as EBE resulted in only 3 firms being certified between 2007 and today.

Finally, on January 7, 2013, following another disparity analysis, Mayor Bloomberg signed Local Law 1 (LL1) that was passed by the City Council in order to better assist M/WBEs. “For too long, minorities and women have been effectively shut out of City contracts. With today’s bill, we level the playing field to give these businesses the access that they deserve”, said Christine C. Quinn, then speaker of the New York City Council, on this occasion “This legislation is important, not only because it provides fairness and equal opportunity to M/WBEs, but because it will help grow business that will provide jobs, spur economic growth and diversify our economy, and because it will increase competition for City contracts, which will translate into lower costs and increased quality.”⁴⁷ According to the City’s Department of Small Business Services (SBS), this law was intended to “help strengthen the existing Minority and Women-owned Business Enterprise Program. Once Local Law 1 (formerly Local Law 129) was signed, the Department of Small Business Services has been implementing improvements to the M/WBE program to continue promoting fairness and equity in City procurement processes.”⁴⁸

The 2013 law removed the 1 million dollar cap on construction, professional services, and standard services procurement for which goals for participation by M/WBEs may be established by the City’s M/WBE Program; at the same time, it lowered the cap on goods contracts to \$100,000. It also allowed city agencies to establish M/WBE participation goals. It is broadly agreed that the removal of the cap was a positive development. “Up until this point, certified M/WBEs could only apply for city contracts that were \$1 million or smaller.”⁴⁹ This cap left no room for growth for M/WBEs and made it seem as though these smaller companies were unable to do the jobs at hand. Lina Gottesman, the president of a specialty contracting company called Altus, was quoted by Bill Bradley saying:



“It is obvious that the cap was to keep us from growing. I think that was because of the attitude that women really can’t handle anything bigger. Thank God our growth isn’t stunted any longer and we have a little bit more growth potential.”⁵⁰

- **Lina Gottesman, President of Altus, Specialty Contracting Company**⁵¹

⁴⁷ Geri Stengel. NYC Encourages Growth of Women Owned Businesses. January 16, 2013. <http://www.forbes.com/sites/geristengel/2013/01/16/nyc-encourages-growth-of-women-owned-businesses/>.

⁴⁸ NYC Small Business Services. ‘Selling to Government,’ www.nyc.gov/html/sbs/html/procurement/M/WBE.shtml.

⁴⁹ Bill Bradley, ‘New York Law Strengthens Minority-and Women-Owned Businesses, Forgets Locals,’ June 27, 2013, www.nextcity.org/daily/entry/new-york-law-strengthens-minority-and-women-owned-businessesforgets-locals.

However, the removal of the cap did not mean that more M/WBEs “would” be hired for contracts that were 1 million dollars or more, it just meant that they “could” now be hired. The subcontracting goals are still non-binding and limited to construction, professional services, standard services (defined by the law as services other than professional and human), and the purchase of goods of up to \$100,000 only. And the requirement to provide M/WBE utilization plans is still limited to mayoral agencies that procure over \$5 million per year; such major spenders as the Department of Education and the Economic Development Corporation are excluded from LL1.

Bradley’s article also pointed to a related problem that affects specifically NYC-based WMBE companies: the cost differences they face when competing for city contracts with out-of-town M/WBEs who are able to offer their services at lower fees:

“The problem that Gottesman and other local contractors run into is nothing new: They have to pay union wages. So their bids are more expensive. And while you can’t blame the city for watching its bottom line, it’s not unreasonable to call for more strict measures to ensure that publicly funded projects go to companies paying city taxes.”⁵²

NYC’s Small Business Services Department provides M/WBEs with help as far as becoming certified and also in obtaining contracts and resolving payment delays, among other issues. As stated in M/WBE Program’s 2013 report, “SBS also works with the City Council through the M/WBE Leadership Association to provide certified firms with more capacity-building services, including help applying for loans and surety bonds, preparing bids and proposals, and marketing to both the public and private sector.”⁵³

Just like the State, “since the implementation of the M/WBE program, the City has undertaken a number of efforts to reduce barriers for M/WBEs and small businesses that are competing for contracts and currently doing business with the City.”⁵⁴ In November 2012, the City’s SBS and the State’s Empire State Development signed a Memorandum of Understanding, which was touted as, “...solidifying joint effort to help small businesses and M/WBEs secure surety bonds for construction projects with New York State and New York City agencies. Firms can now receive a guarantee of up to 30% of a contracts value to secure a surety bond line, bid bond, or performance and payment bond on city contracts valued up to \$2 million. This partnership provides contractors with additional security to bid and compete on larger contracts.”⁵⁵

⁵⁰ Ibid.

⁵¹ Photo source: enpnetwork. www.enpnetwork.com/nurse-practitioners/156271-lina-gottesman.

⁵² See Bill Bradley, footnote 49.

⁵³ City of New York. Minority and Women Owned Business Enterprise (M/WBE) Program. Annual Report for Fiscal Year 2013. Page 8 . http://www.nyc.gov/html/sbs/downloads/pdf/LL129_Oct2013_CityCouncil_Report.pdf.

⁵⁴ Ibid.

⁵⁵ Ibid.

LL1 modified citywide contracting participation goals for M/WBEs that were set by the 2006 law which were never met anyway, and restructured them, based on the disparity findings. Specifically, it replaced “Caucasian females” with “Women”, thus giving an additional option for minority women owners to certify and bid either as an MBE or as a WBE. Further, it combined prime and subcontracting participation goals into a single figure. It established the following goals, expressed as a percentage of total annual agency expenditures on such contracts.⁵⁶

BUSINESS OWNER CATEGORY	CONSTRUCTION	PROFESSIONAL SERVICES	STANDARD SERVICES	SALE OF GOODS UNDER \$100,000
Black Americans	8	12	12	7
Asian Americans	8	No goals	3	8
Hispanic Americans	4	8	6	5
Women	18	37	10	25
Emerging Business Enterprises (EBE)	6	6	6	6

It is noteworthy that the law is not applicable to contracts for human services as well as “sole source” procurements, i.e. where the agency determines that there is no other source for the required good or service. Further, according to CityLimits.org investigative report on the issue, NYC Department of Small Business Services (SBS) “only has jurisdiction over the 34 mayoral agencies, not all 72 agencies spending city money. So its annual reports are based on less than half of the city’s spending.” Specifically, agencies created by state rather than city law (such as the School Construction Authority, Department of Education, and the Board of Elections) are consequently subject to the state, not city laws. Further, according to CityLimits, there is no consensus as to which non-mayoral agencies are covered by the M/WBE law. Thus, SBS reportedly believes that it covers only the 34 mayoral agencies; whereas the City Law Department “contends the law includes elected officials offices and any agency that wasn’t created by a state law,” which also includes such agencies as the Campaign Finance Board and the Department of Investigations.⁵⁷ The Law Department appears to be right, since LL1 does not provide exclusions for any particular agency and defines agency as “a city, county, borough, or other office, position, administration, department, division, bureau, board or commission, or a corporation, institution or agency of government, the expenses of which are paid in whole or in part from the city treasury.”

2014 was the first full year of M/WBE program implementation under LL1. In that fiscal year, NYC awarded almost \$690 million prime and subcontracts to M/WBE firms. This was an increase of 57% from 2013 – but still less than 4 percent of the total of nearly 18 billion city contracts, which was less than in 2010, when M/WBEs were awarded over \$714 million (4.2 percent) of all contracts, or in 2012 when the \$530 million awarded amounted to over 5 percent of the comparatively low city purchasing of \$10.5 billion.⁵⁸ The Mayor’s Office of Contracting Services’ (MOCS) annual “Agency Procurement Indicators” report does not directly address the issue of compliance with LL1’s participation goals, nor does it provide the figures that would answer that question directly; however, simple calculations based on MOCS’ other data yield the following table, which can easily be compared with LL1’s table above:

⁵⁶ <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1189797&GUID=2729B38A-BC05-4393-9857-3295E345C694&Options=ID%7cText%7c&Search=.55>

⁵⁷ Adam Wisnieski, ‘NYC’s MWBE Push: Cracking Down, Looking Ahead,’ December 10, 2013, <http://citylimits.org/2013/12/10/nycs-mwbe-push-cracking-down-looking-ahead>

⁵⁸ “Agency Procurement Indicators: Fiscal Year 2014,” City of New York Mayor’s Office of Contract Services, p. 58, <http://www.nyc.gov/html/mocs/downloads/pdf/2014%20Annual%20Procurement%20Indicators.pdf>.

BUSINESS OWNER CATEGORY	CONSTRUCTION	PROFESSIONAL SERVICES	STANDARD SERVICES	GOODS UNDER \$100,000
Black Americans	0.9	0.7	0.5	0.4
Asian Americans	4.9	4.3	0.3	2.5
Hispanic Americans	0.6	0.2	0.7	0.5
Women	2.8	2.6	5.2	2.3
Emerging Business Enterprises (EBE)	0	0	0	0

Thus, it is plain to see that the city as a whole failed even to approach the participation goals set by the 2013 law in its first full fiscal year. The closest it came to it was with Asian Americans in construction and women in standard services (in both cases, attaining slightly over a half of the LL1 goal). As before, EBE contracting failed even to get off the ground, with only 3 businesses certified since the program's launch in 2007 and only 2 EBEs in the SBS database – evidently due to the complexities of certification and the stigma associated with proving oneself as “socially and economically disadvantaged.”

The failures of city agencies to reach the goals were highlighted in the “Agency Report Card” issued by the City Comptroller. Unlike MOCS annual procurement reports, it used actual agency spending rather than contracts awarded (which allows, among other advantages, to take account of payment delays). The “Report Card” graded only 31 agencies (which, according to the report, account for the majority of the city's WMBE spending), while acknowledging that some large agencies, such as Department of Education and NYPD, had to be excluded.⁵⁸ Within this selection, Department of Cultural Affairs and Landmarks Preservation Commission showed the best results, while such agencies as Department of Environmental Protection, Department of Finance, Department of Information Technology and Telecommunications, and Department of Sanitation ended at the bottom of the scale.⁵⁹

The City Comptroller's office has continued its push for more data transparency by releasing (reportedly for the first time ever in the city as well as in the US) information on some of the subcontracts issued by the city's prime vendors. The information is now available on the Comptroller's Checkbook NYC, the site that tracks city spending. According to this data, M/WBE subcontract spending share in the city has shown a healthy growth from 5% in FY2012 to nearly 15%, or \$4.7 million in FY2015.⁶⁰

The latest city data regarding M/WBE participation posted on Checkbook NYC indicate that in FY2015, M/WBE spending has been merely 4.4 percent (\$511 million) of the total. This is about the same percentage as last year and just one percent higher than in FY2013. Within these 4.4%, about a half has gone to Asian American firms, followed by women and Hispanics, with Black-owned companies coming last, with about 0.3 percent of the total - in a city whose Black population currently stands at 24.6 percent.

⁵⁸ According to the Comptroller's Office, NYPD's and Department of Investigations (DOI) spending cannot be attributed to any given industry group because of “a prior agreement not to publically <sic> display vendor data for security reasons,” while DoE was established by state law and therefore not subject to LL1. Office of the New York City Comptroller Scott M. Stringer, “Making the Grade: New York City Agency Report Card on Minority/Women-Owned Business Enterprises, 2014,” p. 43.

⁵⁹ Office of the New York City Comptroller Scott M. Stringer, “Making the Grade: New York City Agency Report Card on Minority/Women-Owned Business Enterprises, 2014,” p. 5. <http://www.scribd.com/doc/241612676/4/THE-NEXT-GENERATION-OF-LOCAL-LAW-1>.

⁶⁰ http://www.checkbooknyc.com/spending_landing/yeartype/B/year/116/dashboard/ss.

Further, M/WBE spending remains heavily concentrated in a few agencies (topped by the School Construction Authority, which is not subject to LL1, and yet has spent 37.7 percent of all M/WBE money). Likewise, the largest chunk of M/WBE spending ended up in the hands of a handful of companies: top 10 prime vendors have received over 30 percent of all contract spending - including five WBEs, three companies owned by Asian Americans, one Hispanic/Latino-owned, and one whose ownership has not been identified for security reasons. As for subcontracting, of the top 10 M/WBE subvendors, 4 were Asian-owned, 2 WBEs, 2 Hispanic/Latino-owned, and 2 owned by Blacks. (On the bright side, Black-owned firm, R & D Contractors and Builders, has been the largest city subvendor, with almost \$478,000, or 10% of total M/WBE subcontracting funds.)

	SHARE OF NYC POPULATION (2013 ESTIMATE) ⁶¹	PARTICIPATION GOALS PER LL1 (ACROSS CATEGORIES OF CONTRACTS)	ACTUAL MONTHLY SPENDING IN FY2015, AS % OF NYC TOTAL
Women	52%	10-37%	1-2%
Hispanics	29%	4-8%	0.2-0.9%
Blacks	25%	7-12%	0.2-0.4%
Asians	13.5%	3-8%	2-3%

(Note that the key variable - availability of M/WBE firms in the city - is missing because data from city disparity studies that have reportedly been conducted are not publicly available.)

In the view of the Mayor's Counsel in charge of M/WMBEs, Maya Wiley, one of the reasons of these low figures is the NY State requirement (in NYS General Municipal Law) for the city to award contracts to the lowest bidders only. (Sally Goldenberg, 'City plans expanded study of minority business contracts,' February 23, 2015, www.capitalnewyork.com/article/city-hall/2015/02/8562686/city-plans-expanded-study-minority-business-contracts.)

In February 2015, NYC Government announced a plan for a year-long, \$1 million study of M/WBE program, including a "disparity analysis" of M/WBEs' availability vs. their utilization in city contracting. Request for proposals was launched by SBS, with deadline for submissions set for April 9.

Federal programs

At the federal level, the first step toward equal opportunity with regard to M/WBEs was taken in 1958, when the Small Business Act, §8a, mandated assistance to "socially and economically disadvantaged" small businesses. In 1969 and 1971, President Nixon's Executive Orders established the Office of Minority Business Enterprises, requiring federal agencies to assist them.

Much of the subsequent legislation was due to the efforts of the Congressional Black Caucus, established in 1971. In 1977, Congress passed the Public Works Employment Act, introducing the first numerical goal - 10 percent - for MBE participation in federal procurement contracts. In 1978 amendments to §8a established the presumption of social disadvantage for Blacks, Hispanics, and Native Americans (expanded in 1980 to Asian Pacific Americans and in 1987 to women). In 1983, the Disadvantaged Business Enterprise was established at the Department of Transportation (DOT). Finally, in our days, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 established Offices of Minority and Women Inclusion in federal financial agencies, including Federal Reserve and Securities and Exchange Commission, with a mandate to ensure "fair inclusion" of M/WBEs in contracting. In 2011, the Women-Owned Small Businesses (WOSB) Federal Contracts Program was launched.

⁶¹ 2013 American Community Survey 1-Year Estimates, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_1YR_DP05&prodType=table.

The Disadvantaged Business Enterprise (DBE) is a federal program specific to two federal agencies – Department of Transportation (DOT) and Environmental Protection Agency (EPA). Thus, Title 49 Part 26 of the Code of Federal Regulations, which regulates “participation of disadvantaged business enterprises in Department of Transportation Financial Assistance Program,”⁶² has a Certification Unit geared towards certifying DBEs. As stated on their DBE Program website, “this is accomplished by a thorough analysis of the application with the supporting documents and on-site interview. Only small business firms that are independently owned and controlled in both substance and form by one or more socially and economically disadvantaged persons are certified.”⁶³

It is important to note that the DBE Program does not set aside a mandatory “quota,” but rather establishes an “aspirational” goal for DBE participation. This point was argued at considerable length during Congressional hearings in 1998 that are extensively referenced on the DOT website. Thus, as emphasized by Sen. Baucus in those hearings, “contract goals are not binding. If a contractor makes good faith efforts to find qualified women or minority-owned subcontractors, but fails to meet the goal, there is no penalty.” Likewise, a supporting letter from U.S. Secretary of Transportation and Attorney General Janet Reno clearly stated: “The 10 percent figure ... is not a mandatory set aside or rigid quota. First, ... the Secretary of Transportation may waive the goal for any reason ... Second, in no way is the 10 percent figure imposed on any state or locality ... state agencies are permitted to waive goals when achievement on a particular contract or even for a specific year is not possible. The DBE program does not set aside a certain percentage of contracts or dollars for a specific set of contractors. Nor does the DBE program require recipients to use set-asides. The DBE program is a goals program which encourages participation without imposing rigid requirements of any type. Neither the Department’s current nor proposed regulations permit the use of quotas. The DBE program does not use any rigid numerical requirements that would mandate a fixed number of dollars or contracts for DBEs.” And further, “No state has ever been sanctioned by DOT for not meeting its goals. Nothing in the statute or regulations imposes sanctions on any state recipient that has attempted in good faith, but failed, to meet its self-imposed goals.”

Under the impact of this debate, DOT made some significant clarifications to its DBE program rules, relaxing some of its past provisions that could have been interpreted as mandatory requirements. Thus, for example, it clarified that “the 10 percent statutory goal ... is an aspirational goal at the national level. It does not set any funds aside for any person or group. It does not require any recipient or contractor to have 10 percent (or any other percentage) DBE goals or participation. Unlike former part 23, it does not require recipients to

⁶² U.S. Government Publishing Office, Electronic Code of Federal Regulations, http://www.ecfr.gov/cgibin/text-idx?tpl=/ecfrbrowse/Title49/49cfr26_main_02.tpl.

⁶³ United States Department of Transportation. Disadvantaged Business Enterprise (DBE) Program, <http://www.dot.gov/osdbu/disadvantaged-business-enterprise>.

take any special administrative steps (e.g., providing a special justification to DOT) if their annual overall goal is less than 10 percent. Recipients must set goals consistent with their own circumstances ... recipients are prohibited from using quotas under any circumstances. ... Section 26.53 also outlines what bidders must do to be responsive and responsible on DOT-assisted contracts having contract goals. They must make good faith efforts to meet these goals. Bidders can meet this requirement either by having enough DBE participation to meet the goal or by documenting good faith efforts, even if those efforts did not actually achieve the goal. These means of meeting contract goal requirements are fully equivalent. Recipients are prohibited from denying a contract to a bidder simply because it did not obtain enough DBE participation to meet the goal. Recipients must seriously consider bidders' documentation of good faith efforts. To make certain that bidders' showings are taken seriously, the rule requires recipients to offer administrative reconsideration to bidders whose good faith efforts showings are initially rejected. These provisions leave no room for doubt: there is no place for quotas in the DOT DBE program."⁶⁴

In 1987, the U.S. Congress included women to the list of disadvantaged groups. In 2000, it added a new section to Small Business Reauthorization Act, authorizing the establishment of a rule to increase federal contracting opportunities for women, specifically by allowing Federal contracting officers to restrict competition for contracts in certain industries to eligible Women-Owned Small Businesses (WOSBs) or "Economically Disadvantaged" WOSBs (EDWOSBs).⁶⁵ Various draft rules were published since then, but it was only under the Obama Administration that the decision was made to produce and publish the final rule that established Women-Owned Small Business (WOSB) Federal Contracts Program, effective February 4, 2011.⁶⁶ The Program, launched under the U.S. Small Business Administration, has already won high praise from some of the leading M/WBE advocates. Thus, Cheryl McKissack stated:



"The best program to me is the Women-Owned Small Business Federal Contracts Program, the federal program. The reason I say that is because they have a whistleblowing mechanism. A woman-owned business is certified by the federal government, and if someone suspects that it is fraudulent, anyone can call up anonymously and they can be officially checked out.⁶⁷ They don't have an option like this available for NYS or NYC."⁶⁸

- **Cheryl McKissack, President and CEO of Mckissack and Mckissack**⁶⁹

⁶⁴ U.S. Department of Transportation, 'DBE Final Rule: Key Points,' <http://www.dot.gov/osdbu/disadvantagedbusiness-enterprise/dbe-final-rule-key-points>.

⁶⁵ Federal Register, Vol. 75, No. 194 / Thursday, October 7, 2010 / Rules and Regulations, p. 62258, "Small Business Administration, 13 CFR Parts 121, 124, 125, 126, 127, and 134 / RIN 3245-AG06 / Women-Owned Small Business Federal Contract Program," <https://www.sba.gov/sites/default/files/files/2010-25179.pdf>.

⁶⁶ 'SBA Announces Contracting Program for Women-Owned Small Businesses,' 2/1/2011, <https://www.sba.gov/content/sba-announces-contracting-program-women-owned-small-businesses>.

⁶⁷ See <https://www.sba.gov/oig/hotline>.

⁶⁸ For the rules of the Women-Owned Small Business (WOSB) Federal Contract Program, see <https://www.sba.gov/content/women-owned-small-business-program>.

⁶⁹ Photo source: National Women's History Museum. <http://www.nwhm.org/about-nwhm/board/members/cheryl-mckissack>.

A recent example of a whistleblower-led fraud case involving women-owned businesses has been the lawsuit in Chicago, against McHugh Construction, described by the media as “a century-old company that reported more than a half a billion dollars in revenue last year”.⁷⁰ McHugh had \$150 million worth of contracts on major public works projects and was required by law to subcontract about \$40 million of it to M/WBEs. In 2008, a project manager at a woman-owned subcontractor, Perdel Contracting, filed a suit claiming that he was forced to produce false purchase orders, labor hours etc. to show that his company was doing the job that was in fact being done by McHugh. This was followed by a joint federal and state investigation. In the words of Illinois State Attorney General, “the company used women-owned businesses to submit false claims to the state and federal governments for millions of dollars when in fact, those businesses never completed the level of work required by law.” McHugh was able to settle the case out of court, without pleading guilty or losing its federal contracting privileges, by paying \$12 million, 17 percent of which by law went to the whistleblower.⁷¹

In spite of its many success stories, WOSB Program has also been found lacking in effectiveness as well as oversight and transparency, by government agencies and NGOs. Thus, in June 2014 U.S. Women’s Chamber of Commerce (USWCC), which acts as a third-party certifier of WOSBs, announced that 53 percent of the firms that it had denied certification have certified themselves as such in the government database. According to USWCC CEO Margot Dorfman, “The regulations and resulting processes for the federal WOSB/EDWOSB set-aside program have failed to assure that legitimately women-owned and economically disadvantaged women-owned firms are protected from competing against ineligible firms.”⁷² And three months later, U.S. Government Accountability Office 2014 report to Congress concluded that the program “has had a limited effect on federal contracting opportunities available to WOSBs. Set-aside contracts under the program represent less than 1 percent of all federal contract obligations to women-owned small businesses.” Close to 60 percent of federal contracts awarded to WBEs were not through the WOSB program but through other set-asides, such as the general small-business set aside; while close to 40 percent went through general competitive bids. At the same time, Small Business Administration “lacks reasonable assurance that only eligible businesses receive WOSB set-aside contracts,” because certification has been delegated to scores of second and third parties and is not monitored. In fact, its annual eligibility examination of a sample of WOSB contractors in 2012 and 2013 found that in each of these years over 40% of contract recipients were ineligible for these contracts.⁷³ Thus, while both GAO and USWCC call for more accountability in the program, the former implies more control over third-party certifiers, while the latter finds fault with the self-certification option which ultimately leaves the determination of the firm’s eligibility to contracting officers.

⁷⁰ ‘Settlement in \$12 Million Illinois Whistleblower Case,’ <http://www.wcoeusa.com/content/wcoe-turningpoint-562014>.

⁷¹ Jason Meisner, ‘McHugh Construction to pay \$12 million fine as part of federal, state probe,’ Chicago Tribune, May 1, 2014, http://articles.chicagotribune.com/2014-05-01/news/chi-mchugh-construction-to-pay-12-million-fine-as-part-of-federal-probe-20140501_1_suburban-firm-mchugh-construction-elizabeth-perino.

⁷² U.S. Women’s Chamber of Commerce, Flash Report: Accountability in Contracting / 39% of Original WOSB/EDWOSB Certification Applications Are Found Ineligible by Women’s Chamber, https://www.dropbox.com/s/xr56sbkqhjmlqwc/USWCC_Flash_Report_WOSB_Declines.pdf.

⁷³ United States Government Accountability Office, Report to Congressional Requesters, ‘Women-Owned Small Business Program: Certifier Oversight and Additional Eligibility Controls Are Needed,’ October 2014, <http://www.gao.gov/assets/670/666431.pdf>.

III. M/WBE policies and outcomes in other states and cities

Our discussion has so far been focused on New York. Yet M/WBEs are a nationwide presence, subject to federal, as well as state and local legislation and policies. While minorities and women face certain barriers to economic success regardless of location, there are considerable variations across the country. These variations can be accounted for, at least to an extent, by the differences in state and city legislation and policies, and the time and effort expended by relevant authorities to improve the situation.

In California, according to Paul M. Ong:

*"Twenty-five years ago, M/WBEs did not receive government contracts in any significant numbers; many contracts were likely to go to the same firms year after year... Studies done in the 1980s and 1990s reveal that... in cities with large minority populations, M/WBEs were virtually excluded from public-contract awards."*⁷⁴

Currently, opportunities for M/WBEs in government contracting in California are legally constrained – by the so-called Proposition 209, an amendment to California's constitution which, since its adoption in 1996, prohibits state government from giving "preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." How does California, as well as its key cities, look today, with regard to the state of their M/WBEs and city contracting, as compared to the State and the City of New York?

To be able to compare them, we put together in the table below some of the key data on minority population and the state of M/WBEs, comparing New York State to California. Paradoxically, a comparison of M/WBE key indicators from New York and California from the 2007 Business Owners Survey reveals that M/WBEs in California are generally better off.

New York State key M/WBE indicators, 2007

KEY INDICATORS		ALL FIRMS CLASSIFIABLE BY OWNER'S RACE & GENDER I.E. PRIVATE FIRMS	MBEs	WBEs
Number of Firms		1,890,719	537,544	594,517
% of total		100%	28%	31%
REVENUES	\$	\$769,691,830,000	\$79,419,259,000	\$63,851,312,000
	% of total	100%	10.3%	8.2%
	Average per firm	\$407,089	\$147,745	\$107,400
PAID WORKERS	Number	3,411,024	370,061	461,725
	% of total	100%	10.8%	13.5%
	Average per firm	1 and 1 half-time	1 half-time	1 half-time
ANNUAL PAYROLL	Total	\$143,510,137,000	\$11,562,876,000	\$15,923,865,000
	Per worker	\$42,072	\$31,246	\$34,488

⁷⁴ Paul M. Ong, *Impacts of Affirmative Action: Policies and Consequences in California*, Alta Mira Press, 1999, p. 136.

California key M/WBE indicators, 2007

KEY INDICATORS		ALL FIRMS CLASSIFIABLE BY OWNER'S RACE & GENDER I.E. PRIVATE FIRMS	MBEs	WBEs
Number of Firms		3,321,643	1,220,581	1,039,208
% of total		100	37%	31%
REVENUES	\$	\$1,395,302,309,000	\$283,713,234,000	\$182,981,823,000
	% of total	100%	20.3%	13.1%
	Average per firm	\$420,064	\$232,441	\$176,078
PAID WORKERS	Number	6,852,682	1,471,933	962,203
	% of total	100%	21%	14%
	Average per firm	2	1	1 half-time
ANNUAL PAYROLL	Total	\$253,044,281,000	\$43,378,804,000	\$30,404,753,000
	Per worker	\$36,926	\$28,791	\$31,599

These two tables clearly show that California's M/WBEs significantly exceed those in New York State not only in absolute numbers, but also in their share in the total number of privately owned firm; their revenues, both in absolute terms and as a share of the total; their number and share of paid workers, as well as the average number of workers per firm; and their annual payroll. The only indicator that places NY ahead of California is the average amount of the firm's payroll per individual worker.

Los Angeles' Bureau of Contract Administration provides some important protections to subcontractors that are not available in New York City. Thus, for example, if a subcontractor is not paid on time by the prime contractor, the former can file a stop notice with the Bureau of Public Works which then has the power to withhold the amount of money owed by the prime contractor to the subcontractor until the payment issue has been resolved.⁷⁵ Further, LA has established a Mandatory Subcontracting Minimum (MSM).

In San Francisco, Contract Monitoring Division of the Office of City Administrator "establishes project-specific LBE subcontracting participation goals on most City-funded projects, and contractors bidding on these projects must satisfy the LBE participation goals for their bid to be deemed responsive." Further, "when LBEs bid on City projects at the prime contracting level they may be eligible for a bid discount ranging between 2% - 10%" – a system that was briefly used in New York City under Mayor Dinkins.

It is also worth noting that SF authorities have established a "Micro Set-Aside Program," through which "smaller contracts are carved out specifically for "micro-LBEs".

Last, but not least, San Francisco has a Surety Bond & Financing Assistance Program – "designed to help LBE contractors who are participating in City construction projects obtain and/or increase their bonding and financing capacity."⁷⁶

⁷⁵ Office of Contract Compliance, Subcontractor Outreach and Enforcement, "Frequently Asked Questions," http://bca.lacity.org/index.cfm?nxt=slb&nxt_body=div_occ_sub_faq.cfm.

⁷⁶ Office of the City Administrator, Contract Monitoring Division, April 15, 2014, www.sfport.com/modules/showdocument.aspx?documentid=7898.

Baltimore is one of several cities and states that are creating ways to increase M/WBE participation in contracting with their governments. Baltimore's black Mayor, Stephanie Rawlings-Blake, recently established the Supplier Diversity and Inclusion Week in the city (October 28-November 3, 2013). One of the highlights of the week was the 7th annual Top 100 MBE Awards ceremony. The Top 100 MBE program

*"is a region-wide effort, recognizing minority-and-women-owned businesses in Maryland, Pennsylvania, Virginia, Delaware, and the District of Columbia. Each of the Top 100 MBEs serves, in one way or another, as a model for success and an example of the tremendous impact that the M/WBE community is having on our nation and our economy."*⁷⁷

The City of Baltimore also acknowledges the difficulties that M/WBEs have to face, as part of the nationwide struggle for the economic advancement of women and minorities. In Mayor Rawlings-Blake words, "Minority and women owned businesses continue to progress and succeed against very real challenges, including disparity in access to venture capital and deal flow, as well as roadblocks in obtaining critical, timely information-particularly when it comes to government and private procurement."⁷⁸

In Louisiana, meanwhile, in one of the most high-profile construction projects nationally – the post-Katrina rebuilding of the New Orleans area – authorities have long been criticized for insufficient efforts on DBE/M/WBE inclusion. In the aftermath of the hurricane, the Congressional Black Caucus (CBC) led the effort to pass legislation to ensure more local inclusion in federal recovery contracts. However, the Hurricane Katrina Recovery, Reclamation, Restoration, Reconstruction and Reunion Act of 2005, sponsored by the entire 42-member Caucus, failed to pass. It took local effort and many years to increase inclusion. In particular, New Orleans Regional Transit Authority was significantly underperforming on its federal DBE participation goals: in 2001-2007, it was setting its annual goals at 20 or 30 percent, but the actual rate was below 10. After an evaluation in 2009, the agency was reportedly able to improve, with around 25 percent participation both set as a goal and achieved.⁷⁹ The school rebuilding program was in even worse shape in terms of inclusion: in 2012, DBE participation in the Orleans Parish School Board and the Recovery School District combined was at 2 percent. The agencies created a DBE Oversight Team with several partners, including the Louisiana Association of General Contractors and the Greater New Orleans Urban League. By 2014, they reported a participation increase of 25 percent.⁸⁰ Meanwhile, the new ordinance passed by the New Orleans City Council established the overall goal of 35 percent utilization of socially and economically disadvantaged businesses "for all public spending or private projects that utilize public funding and/or incentives." However, it is based on "good faith efforts" and is not mandatory.⁸¹

⁷⁷ Stephanie Rawlings-Blake, Mayor, 'Ensuring Economic Opportunity,' November 1st, 2013, Mayor.Baltimore city.gov/news/blog/2013-11-01-ensuring-economic-opportunity.

⁷⁸ Ibid.

⁷⁹ Anitra D. Brown, 'Getting Down to Business, *The New Orleans Tribune* <no date>, <http://www.theneworleanstribune.com/main/getting-down-to-business/>.

⁸⁰ 'OPSB and RSD Report Significant Progress in DBE and Local Contractor Participation in the School Rebuilding Program,' rsdla.net/apps/news/show_news.jsb??REC_ID=318422&id=0.

⁸¹ <http://www.nola.gov/economic-development/supplier-diversity/faq/>.

Ohio is one of few states that have M/WBE programs in the country that are or come close to being mandatory. Ohio has an official set-aside, defined as “purchase selected for restricted competition among Ohio certified MBE’s only ... State agencies are required to select a number of purchases, the aggregate value of which equals approximately 15% of the total goods and services purchased for the current fiscal year, for set aside competition. ... if no bid is submitted by a certified MBE, the purchase shall be made according to usual procedures. The agency shall set aside additional purchases for which only certified MBE’s may compete, as are necessary to replace those purchases previously set aside but were not awarded.” Ohio’s other program, with a slightly more relaxed set of rules, is called EDGE (Encouraging Diversity, Growth & Equity). It is not a set aside but rather a 5 percent participation goal for “socially and economically disadvantaged” businesses. However, agencies are required to submit a combined MBE/EDGE Projection Plan and to report their MBE expenditures on a quarterly and annual basis.⁸²

Several states have made efforts to increase opportunities for M/WBEs specifically in the financial sector. Thus, Ohio, California, Illinois and Maryland, among others, established mandatory investment by public pension plans into women- and minority-owned investment companies. Thus, Maryland allocates 5 percent of its public pensions investments to M/WBE funds, while Illinois established a target of 20 to 30 percent. It is noteworthy that, according to Barclays, “performance, both in terms of absolute returns and risk-adjusted returns, is substantially stronger” for M/WBE than for non-M/WBE hedge funds. However, the availability of M/WBE hedge funds remains quite small - merely 3.3% of the total.⁸³

⁸² Ohio Department of Administrative Services, ‘State of Ohio Procurement Handbook for Supplies and Services,’ http://procure.ohio.gov/pdf/PUR_ProcManual.pdf.

⁸³ Barclays Capital, ‘Affirmative Investing: Women and Minority Owned Hedge Funds,’ <http://www.managedfunds.org/wp-content/uploads/2011/08/HF-Pulse-Affirmative-Investing-June-2011-Letter.pdf>.

IV. Barriers to M/WBE Success in New York region

The main problem with M/WBEs today is that despite the efforts to level the playing ground between M/WBE and non-M/WBE, M/WBEs are still receiving the short end of the deal. All of these obstacles on the path to M/WBE success beg the question: why are white male-owned firms not facing the same issues? And what is to be done to equalize the opportunities in real life?

"Good faith effort" isn't good enough: the absence of mandatory inclusion

M/WBE participation goals in New York State and New York City laws and regulations are not mandatory. Instead, they limit agencies' responsibilities with regard to identifying an M/WBE contractor to "best efforts" or "good faith efforts":⁸⁴ agencies and their contractors are required to show that they made just such an "effort" to attain the goals. In the view of many observers, this wording provides leeway for city agencies and their traditional contractors to circumvent the government-set goals for M/WBEs' participation. Thus, New York City law enables city agencies to grant modifications to contracts with regard to MBEs and WBEs contracting participation goals established by the city, if the agency determines that the contractor in question "has established, with appropriate documentary and other evidence, that it made all reasonable, good faith efforts to meet the goals set by the agency for the contract." Says Joe Coello:



Good faith effort could mean they can fax you something, email you something, have someone hand you a flyer, and if they can prove that they made a good faith effort in trying to locate you, they can then go out and hire a white company. Now, if you put in there 'shall not have contract unless minority business has been vetted and approved', they will do everything in his power to find me and [utilize] me. Good faith effort is not a legal mandate - it is merely a suggestion."

- **Joseph Coello Sr. President/CEO of Brookman Construction Co., Inc.**

It must be noted that many attempts to establish legal penalties for failing to comply with DBE/M/WBE participation goals, i.e. to make them mandatory, have not been successful. Thus, for example, in 2012 federal legislative provisions that would have limited future procurement spending by agencies failing to meet a goal, or that would deprive these agencies' senior execs of their bonuses or sabbaticals, failed to pass. As noted by Congressional Research Service, a mandatory requirement would be considered a quota and would be challenged in courts.⁸⁵

⁸⁴ Locals Laws of the City of New York for the Year 2013, No. 1, https://stateinnovation.org/uploads/asset/asset_file/1993/2013_New_York_Local_Law_1.pdf, p. 31.

⁸⁵ See *Adarand Constructors*, 228 F.3d at 1181 (upholding the constitutionality of aspirational goals on the grounds that such goals are not mandatory). And even aspirational goals have been challenged. See Congressional Research Service, 'Federal Contracting and Subcontracting with Small Businesses: Issues in the 112th Congress,' January 24, 2013, <https://www.fas.org/sfp/crs/misc/R42390.pdf>.

Start-up funding, certification and contract procurement challenges

As anyone familiar with the process of starting a business knows, availability of start-up capital is key. According to ESDs guide to owning and operating a small business in NY State, "Insufficient start-up money, or under-capitalization, is one of the major reasons half of all small businesses fail during the first two years."⁸⁶

M/WBEs face several obstacles with securing start-up capital. According to EthnicMajority, founded by Clifford Tong, CEO of Diverse Strategies, a business and management consulting firm in Oakland, California,

*"Access to the funding needed to start a business is almost always an issue, especially with those owned by African, Hispanic (Latino), or Asian Americans, who are more likely to lack the financial resources necessary to achieve adequate capitalization. A 2000 report published by the U.S. Minority Business Development Agency concludes that the growth of Minority Business Enterprises has contributed to the strong growth of the U.S. Economy, but that growth cannot continue without removing capital formation constraints."*⁸⁷

Two of the ways to secure external funding for any startup are debt financing, i.e. borrowing, and equity financing, i.e. selling shares. But it's not so simple when it comes to M/WBE startups. There would be few takers for the shares of a disadvantaged startup going public. As for obtaining loans to start and/or maintain M/WBE businesses, this may only be a little easier to do, and often under predatory conditions only.

Data collected by the Federal Reserve Board's Survey of Small Business Finances as well as by the U.S. Small Business Administration point to the evidence of discrimination in the small business credit market. Further, there is the lack of confidence on the part of the traditional contractors in M/WBE businesses' performance. One program to address this issue was developed by the U.S. Small Business Administration.⁸⁸ SBA offers what is known as the Surety Bond Guarantee Program, which offers four types of surety bonds: Bid Bonds, Payment Bonds, Performance Bonds, and Ancillary Bonds.⁸⁹

Thomas D. Boston, author of *Leading Issues in Black Political Economy*, identifies four obstacles that are common to minority businesses that put them at a disadvantage when it comes to obtaining procurement contracts: "(1) the lack of direct access to products, (2) the lack of disposable capital, (3) the lack of human capital, and (4) the lack of administrative and technical support."⁹⁰

⁸⁶ Empire State Development. *Your Business: A Guide To Owning and Operating a Small Business in New York State*, <http://www.esd.ny.gov/SmallBusiness/Data/YourBusiness.pdf>, p. 2.

⁸⁷ Ethnic Majority, Critical Issues: Minority Owned Business Funding. 2012. www.ethnicmajority.com/MBEfunding.htm.

⁸⁸ Created in 1953, SBA is an "independent agency of the federal government to aid, counsel, assist and protect the interests of small business concerns, to preserve free competitive enterprise and to maintain and strengthen the overall economy of our nation." U.S. Small Business Administration. Mission. [Http://www.sba.gov/aboutsba/what_we_do/mission](http://www.sba.gov/aboutsba/what_we_do/mission).

⁸⁹ A surety bond is "a written agreement between a Surety Company and the Contractor, or Principal that helps protect the project owner, or Obligee, in the event the Contractor fails to successfully perform the contract." U.S. Small Business Administration. Surety Bonds: The Basics. [Http://www.sba.gov/content/surety-bonds-basics](http://www.sba.gov/content/surety-bonds-basics).

⁹⁰ Thomas D. Boston. *Leading Issues in Black Political Economy*, Transaction Publishers, 2002, p. 496.

Reginald Swiney, founding president of R.S. Painting Co., a certified minority-owned business in Brooklyn, provided his perspective on these issues in his extensive interview for this report:



"Whites have an advantage because they help each other better, and it's more common that they get a better break than us. Our (black) companies always have to be ten times better when we're doing the same exact thing as white-owned firms. We need to know how the government works: it can either get you hung up in the bureaucratic red tape - or it can teach you enough to know that before you get started you must understand the animal. If I'm hunting a bear, I have to know how to track a bear. Understand the market you are entering, and if it's government, understand the payment process, making sure the documentation is right, making sure you finish the job. If you have all your ducks in a row, why are we always having payment problems? That is the nature of the beast - of the industry we're in, but we bear the brunt more than anyone else."

- **Reginald Swiney of RS Painting Co.**

Similarly, Cheryl McKissack feels that racial and gender bias holds the answer as to why procuring contracts is difficult for M/WBEs:

"You can take my 100 million dollar business and pair it up with another 100 million dollar business that is run by a white male. If the two of us are working on the job together and a problem happens, they're going to come to me first and think that it is my group. I would then have to prove with much more tenacity that it's not my problem as opposed to the other firms' problem. That affects your ability to obtain contracts. When the people around the room are making the decision on who is getting the contract, and they all look like the white male, they choose the white male, because it is the easier path in their view. It's a proven entity, when they look at me, they see it as a risk."

In his interview, Swiney also pointed to another problem - the failure of the beneficiaries of the M/WBE program to rally around it and to safeguard its integrity: "We do not lobby the bills that serve our interests, and we don't protect these bills. In the same way, we don't fight for the M/WBE program, as an exclusive program that it is. It is a civil rights program from my perspective. And we do not protect it from misuse. It's unbelievable what took place in this regard in the last 10-20 years. The program has been dwindled away and saturated with companies that are not supposed to be in it. You shouldn't be able to reap the benefits of M/WBEs if you are an advantaged business."

An authoritative voice in advocacy for M/WBEs is Rev. Jacques Andre DeGraff, Minister of Canaan Baptist Church of Christ, located in West Harlem. He was one of the leaders of the coalition of M/WBEs that advocated for and helped pass LL1. In his interview for this report, Rev. DeGraff expressed his opinion that "M/WBE challenges are rooted in the Civil Rights movement." A major paradox of that movement is that while it fought for the rights of minorities, including their right to share in America's economic prosperity, the actual fighters who helped win these battles for the most part had no opportunity to benefit from the fruits of those victories, including from the legislative gains for minority-owned businesses. In the words of Rev. DeGraff, "the folks that fought the fight, end up with the least."

Joe Coello, owner of a Brooklyn-based construction firm, describes yet another set of obstacles – those involved in getting a company certified as minority-owned:

"The first fight is to get your minority certification, get the application into the city and state agencies. That's the hardest thing to do because that requires three years of your personal taxes, three years of you working on a job for someone else. These guys – minority entrepreneurs - can't put three years worth of a resume together because they bounce from job to job. The city then says 'how are we supposed to recommend you?' My question is: why are you making it a requirement? If I want to open a flower shop, I don't have to show you I worked at another flower shop for three years. But you require on my minority certification, three years of personal taxes, three years of business taxes, have a resume this long, to qualify just to be a M/WBE and do work with the city and state. Then the union isn't going recognize you, because they don't have to. The state says: only recognize them if they have an M/WBE certificate."

Reverend DeGraff echoed this theme of certification barriers: "It is not right to pretend to open the doors, after having locked us out all of those years, only to say that we aren't ready to get in."

Lack of sufficient information tools for M/WBEs to compete for government purchases is identified in the Office of New York State Comptroller's (OSC) Research Brief, 'Taking Affirmative Action to Improve New York State's M/WBE Program,' as yet another issue that hinders government procurement from M/WBEs. The Brief says:

"OSC annually publishes a Directory of Frequently Purchased Commodities and Service by New York State Agencies which provides ranges of agency expenditures for various types of expenditures within categories, such as supplies, equipment and information technology. However, there is currently no comprehensive statewide database of procurement opportunities that M/WBE firms can use to identify specific purchases of goods and services for which they can compete."⁹¹

If they want to succeed, minority companies need to stay up to date with the latest technology in their respective industry. However, Reginald Swiney feels that:

"Minorities don't follow the trend. We sometimes follow it, but it moves so quick that we often fail to catch up with it. For example, the whole industry just went paperless. If you didn't buy the software and didn't know where to get the Dolby Takeoff Software for a good price instead of thousands of dollars, you lost business. I lost business for six months."

Obviously, M/WBEs who cannot afford to buy a software product that has become standard in a business but still costs thousands of dollars are at a disadvantage for not having it when bidding for contracts.

⁹¹ See footnote 27.

Getting Paid For M/WBE Work: Too Little, Too Late

In his interview for this report, James Heyliger shone light on the issue of payment delays by contracting agencies:

"The two major industries that money is made off of in this country are finance and construction. You can win one contract in construction, say for \$400,000, and if you manage it correctly, you can last a year. You may only get 70-80 thousand out of that, but that may carry you until you get your next contract. But if you're working for me as a subcontractor and I hold up your money, I'll put you out of business. By the time you complain and start jumping up and down and pressuring me for money and I'm complaining you didn't do this, you didn't do that, you can get shut down, thrown off the job, and then you have tax problems."

The challenge of not getting paid on time is compounded by the comparatively low pay for government-contracted jobs. The NYS 2010 Disparity Study also conducted interviews with a few M/WBE owners concerning issues that were affecting them directly, concluding that "payment was a universal problem. Smaller firms, including most M/WBE, found low pay to be a major barrier to participating on State contracts as either a prime vendor or a subcontractor."⁹⁵

Cheryl Mckissack put it as follows: "As a sub-contractor, you are the first to put your bill in and the last to get paid. When you put the bill in you already funded the job, and if there are no glitches you get paid in 2-3 months. Being a subcontractor, the cash flow is the lifeline of your company."

And yet, as noted by the 2010 Disparity Study, among others, M/WBEs are even less likely to be contracted and make any money outside of government contracting and its affirmative policies. This is demonstrated by the lack of M/WBE success in such sectors as the financial services industry. For example, in 2013 alone, both Apple and Verizon held the title of the two largest corporate bond issuance deals in history. As pointed out by The Rainbow PUSH Wall Street Project, "There were no minority owned broker dealers (M/WBEs) included in either Apple or Verizon's landmark transactions. This exclusion accentuates the issue of under-utilization of minority firms in the financial market place and elevates the need for a remedy to this problem of inequality."⁹⁶

A major attempt to build M/WBE presence in financial services dates back to before the Great Depression: 1927 saw the birth of the National Bankers Association (initially founded as the Negro Bankers Association). This association "served as an advocate for the nation's minority and women owned banks on legislative and regulatory matters concerning and affecting our members and the communities they serve."⁹⁷ However, its capacity to play such a role has been clearly limited – not least by the numerical decline of black-owned banks. As noted, for example, by *The Washington Post*, "minority-owned banks have been particularly hard hit during the recession. Many are smaller institutions with less than \$100 million in assets that have struggled to stay afloat amid recent financial turmoil. There were 54 African American owned banks in 1994. Today there are 21, according to the Federal Deposit Insurance Corp."⁹⁸

⁹⁵ See footnote 28.

⁹⁶ Rainbow PUSH Wall Street Project. Minority Inclusion in Debt Capital Markets: A Ranking of Corporate Issuers. February 2014. http://rainbow.3cdn.net/f2a960ee4d9b0e4ff6_yem6brrj7.pdf.

⁹⁷ National Bankers Association. History. <http://www.nationalbankers.org/history.asp>.

⁹⁸ Abha Bhattarai, 'Industrial Bank, D.C.' last African American-owned bank, receives \$1M investment,' *Washington Post*, October 6, 2013. http://www.washingtonpost.com/business/capitalbusiness/industrial-bankdcs-last-african-american-owned-bank-receives-1m-investment/2013/10/04/de5ab232-27bc-11e3-b3e9-d97fb087acd6_story.html.

As implied by all of the above, some of the obstacles to M/WBE success are of a systemic nature. Further, M/WBE issues cannot be isolated from the larger economic trends, including system-wide constraints upon adding labor. In the words of Reginald Swiney, "In the past, hiring qualified people was seen as the right thing to do for the government. Now it's viewed as a burden." And, as noted in the 2010 Disparity Report, discrimination against minorities and women as entrepreneurs and as employees are the two sides of the same coin that reinforce each other:

"...minorities and women earn substantially and significantly less than their non-minority male counterparts. Such disparities are symptoms of discrimination in the labor force that, in addition to its direct effect on workers, reduce the future availability of M/WBEs by stifling opportunities for minorities and women to progress through precisely those internal labor markets and occupational hierarchies that are most likely to lead to entrepreneurial opportunities. These disparities reflect more than mere "societal discrimination" because they demonstrate the nexus between discrimination in the job market and reduced entrepreneurial opportunities for minorities and women. Other things being equal, these reduced entrepreneurial opportunities in turn lead to lower M/WBE availability levels than would be observed in a race-and gender-neutral marketplace."⁹⁹

Inequalities among M/WBEs: white women- vs. minority women-owned companies

As discussed above, NYC's Local Law 129, which re-established the city's M/WBE program that had been shut down by the Giuliani administration, included a major ambiguity concerning women-owned businesses: while referring to them as such throughout the text, the law set citywide participation goals for businesses owned by "Caucasian females," not by any women.

Was that justified by particular disadvantages in this group? Let the reader judge, by comparing the number and the revenue size of businesses owned by white and minority women, as well as in comparison to white male ownership, nationwide and in New York State (unfortunately, the Census' Business Survey data are not available at that level of detail for New York City).¹⁰⁰

⁹⁹ See footnote 28, "The State of Minority- and Woman-Owned Business Enterprise: Evidence from New York," p.4.

¹⁰⁰ 2007 Survey of Business Owners, 'Statistics for All U.S. Firms by Industry, Gender, Ethnicity, and Race for the U.S., States, Metro Areas, Counties, and Places: 2007,' http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=SBO_2007_00CSA01&prodTy=pe=table. Percentages in these tables do not add up to 100 because of mixed-ownership firms, as well as because a number of Latinos/Hispanics define themselves as racially white, but are also an ethnic minority.

US (2007)

	NUMBER OF FIRMS		REVENUE		
		% of total	\$	% of total	Per firm
Female-Owned Business	6,359,063	82%	1,068,124,140,000	89%	\$167,969
Female-Owned Minority	2,212,777	28%	186,180,130,000	16%	\$84,139
Female-Owned Total	7,792,115	100%	1,196,608,004,000	100%	\$153,567
	NUMBER OF FIRMS		REVENUE		
		% of total	\$	% of total	Per firm
Female-Owned White	6,359,063	28%	1,068,124,140,000	10%	\$167,969
Male-Owned White	13,900,554	62%	8,478,196,600,000	83%	\$609,918
White-Owned Total	22,595,146	100%	10,240,990,714,000	100%	\$453,239

NY STATE (2007)

	NUMBER OF FIRMS		REVENUE		
		% of total	\$	% of total	Per firm
Female-Owned White	443,157	75%	72,330,688,000	86%	\$163,217
Female-Owned Minority	209,517	35%	14,284,358,000	17%	\$68,178
Female-Owned Total	594,517	100%	83,851,312,000	100%	\$141,041
	NUMBER OF FIRMS		REVENUE		
		% of total	\$	% of total	Per firm
Female-Owned White	443,157	30%	72,330,688,000	10%	\$163,217
Male-Owned White	900,468	60%	584,797,582,000	83%	\$649,437
White-Owned Total	1,493,356	100%	704,689,306,000	100%	\$471,883

As these figures indicate, firms owned by white women have a significant advantage over those owned by minority women: the former's share of revenues among all women-owned companies is 11 percent higher than their share of the total number of women-owned firms, while firms owned by minority women have a share of revenue which is merely a half of their share of the total number of firms. (As mentioned before, the sum of these percentages is more than 100 in part due to some of the Hispanics that identify racially as white but are still an ethnic minority.) In absolute figures, the average revenue of a firm owned by a minority woman in the US is a half of the average for a white woman's company; it is even less than that in NY State. It remains to be seen whether the yet-to-be-published data from the 2012 survey will bring any change to this picture.

"Men In Skirts" and Other Transparency Issues

On top of these challenges, M/WBE programs have not been immune to abuse by unscrupulous companies. Thus, in November 2014 a grand jury in Manhattan indicted a contractor and recommended more scrutiny of applicants to the program, as well as increasing criminal penalties (including prison terms of up to 25 years). In the words of District Attorney Cyrus Vance Jr., "Broadly speaking, the evidence before the grand jury revealed that there was systemic criminal conduct by several individuals and corporations in the construction industry spanning at least a decade."¹⁰¹ Specifically, "general contractors on city projects were found to fudge paperwork" as if M/WBE subcontractors did the work which in reality they didn't do, "to fake compliance with the program."



Reverend DeGraff commented on the fraud that had been committed and on its impact on other businesses: "Those minority businesses who were never for the M/WBE program to begin with, are even more scared to participate now because of the recent findings. There is a big issue when \$25 million was wrongfully obtained because of the construction scams."

- **Reverend Jacques DeGraff, Nielsen Media African American Advisory Board; M/WBE advocate**

This is another major transparency-related problem, known as "Men In Skirts". Cheryl McKissack, the president of McKissack & McKissack, the oldest M/WBE in the US in design and construction, explains the term's meaning: "white males are setting their family members in separate businesses and using them as subs. Or husbands and fathers putting their wives and daughters in control at 51% to obtain M/WBE funds." According to McKissack, this fraud led to the artificial inflation of the share of M/WBE contractors in government reports.

While it is clear that fraud is posing a serious challenge to M/WBEs as well as the credibility of existing regulations in this area, opinions differ on how best to address the issue. The New York grand jury's recommendations are at one end of this spectrum. For their part, Lawrence A. Dany III and Patricia A. Gorham argue that further criminalizing fraud in this area may have unintended side effects, such as government officials' reluctance to certify M/WBEs, as "certifying individuals would be taking on a significant and highly risky obligation." In their view, the grand jury's proposals are "a heavy-handed reaction to what is at heart a failure to effectively administer a government program."¹⁰²

¹⁰¹ Shayna Jacobs. Grand Jury Finds Fraud in Program Pushing Construction Jobs to Minority-, Women-led Businesses: DA. November 25, 2014. <http://www.nydailynews.com/new-york/nyc-crime/grand-jury-finds-fraud-minority-construction-program-da-article-1.2023026?cid=bitly>.

¹⁰² Lawrence A. Dany III and Patricia A. Gorham, 'Criminalizing Fraud in Minority- and Women-Owned Business Certification', New York Law Journal, 02/09/2015.

The lack of a 'central address' fully dedicated to M/WBEs in city and state governments

Effectively addressing the challenges outlined above requires having a clear line of responsibility for M/WBEs in both city and state governments. In other words, in each of them there needs to be an office exclusively in charge of M/WBE issues and reporting directly to the mayor and the governor respectively. However, at present this is not the case.

Thus, for example, the most senior NYC government officer responsible for M/WBEs - the City's Minority/Women Owned Business Enterprise Director - also juggles a number of other responsibilities. These include serving as the Mayor's legal counsel on all issues; leading "special projects, such as expanding affordable broadband access across all five boroughs, jobs for all New Yorkers and civil and human rights and gender equity;" etc.¹⁰³

Meanwhile, the Chief Diversity Officer (CDO) under NYC Comptroller (whose M/WBE responsibilities are defined as "delivering innovative solutions to increase contract opportunities") combines them with work on "supplier, workplace and board diversity initiatives."¹⁰⁴

Likewise, NY State's CDO - whose job, unlike City offices, was established by an act of law in 2010 - shares its M/WBE responsibilities with the task of "examining issues related to workforce diversity."¹⁰⁵

V. Recent public/private projects in New York region: A chance for inclusion or another missed opportunity?

To get a better idea of opportunities still available for a substantial M/WBE participation in New York, it is worth reviewing at least some of the most recent and ongoing construction projects in New York State and the city.

The future of M/WBEs and the implementation of city and state goals for their participation are most immediately affected by decisions around ongoing large infrastructural projects. One of them currently under particular attention is the **LaGuardia Central Terminal Project (LCT)**, meant to improve the workings and the reputation of an airport characterized by US Vice President Biden as having "the worst passenger service in the world". The LCT project, which will expand the airport size by one-third and includes a three-level, 1.3-million-square-foot new terminal, has a price tag of \$3.6 billion and is expected to create almost 15,000 jobs and some \$4.5 billion in economic activity in the area, according to a September 2014 letter from Congressman Charles B. Rangel to Port Authority of NY & NJ (PANYNJ) Chairman John Degnan.¹⁰⁹

¹⁰³ <http://www1.nyc.gov/office-of-the-mayor/maya-wiley.page>.

¹⁰⁴ https://comptroller.nyc.gov/pt_administrator/carra-wallace.

¹⁰⁵ See <http://programs.governor.ny.gov/diversity/about>.

¹⁰⁶ Peter Davis, 'Willels Point debates continue to rage,' The Queens Courier, <http://queenscourier.com/willelspoint-debates-continue-to-rage-4960/>.

¹⁰⁷ Chris Smith, 'Players Maneuver Before Ranking of Long Island College Hospital Proposals,' March 28, 2014, <http://nymag.com/daily/intelligencer/2014/03/monday-ranking-long-island-city-hospital-proposals.html>.

¹⁰⁸ Mary Frost, 'Black, Puerto Rican Caucus Protests SUNY's Treatment of LICH Bidders,' Brooklyn Daily Eagle, June 23, 2014, <http://www.brooklyneagle.com/articles/2014/6/23/black-puerto-rican-caucus-protestssuny%E2%80%99s-treatment-lich-bidders>

¹⁰⁹ <http://rangel.house.gov/sites/rangel.house.gov/files/images/LETTER.pdf>. See also Exhibit A at the end of this paper.

In this letter (endorsed by two NY State Senators, Adriano Espaillat and James Sanders, Jr., as well Assemblyman Herman D. Farrell, Jr. and other elected officials), the Congressman called for, in fact, mandatory inclusion of 35% DBE and MBE businesses into any contract on this project, as well as for “more than a good faith effort” to include 35% of DBE and MBE companies not only in construction work, but also in operations, financing, and design contracts.

As noted in Senator Espaillat’s supporting letter, a mandatory inclusion of M/WBEs and DBEs at 35% has been adopted in other similar airport projects – in Atlanta, New Orleans, and Philadelphia. However, the Port Authority’s ‘Request for Qualifications’ (i.e. the invitation to bid for contracts), issued in October 2012, did not emphasize M/WBE or DBE goals.

In January 2014, NY State Governor Cuomo announced that the State was taking management responsibility for construction at LaGuardia and JFK. In October, he offered three awards (\$500,000 each) for a master plan to redesign JFK and LaGuardia.¹¹⁰ These master plan design competitions were scheduled for completion by February 2, 2015. It is worth noting that in the competition rules posted on PANYNJ website the reference to M/WBEs is limited to just one sentence: “MBWE firms are encouraged to submit.”¹¹¹

Meanwhile, judging from the website, the LCT project appears to be at a fairly advanced stage – given that one contract, for the East End Substation Foundation, has already been awarded back in 2012 and the construction has started; further, in 2013 three firms were selected as a result of Request for Qualifications (referenced in Rangel’s letter) and invited to submit Requests for Proposals.¹¹² According to the site, selection of a “public private partnership” for terminal redevelopment was planned for the last quarter of 2014, but it is unclear whether this has been completed. For 2015, LCT work has been allocated \$260 million in PANYNJ annual budget. How much of this work will be contracted to M/WBE companies? Given the State’s management responsibility for this project, the political costs of a non-compliance with M/WBE goals could probably be higher than usual.

Another development project in the city, which is nearly twice as large as LaGuardia’s – Columbia University (CU)’s \$6.3 billion northward expansion to the area between West 125th and West 134th Streets, known as **“Manhattanville”** and estimated to take about 20 years, – has been in the center of controversy since before its inception. To begin with, Columbia resorted to the use of “eminent domain,” i.e. basically the seizure of small businesses’ property, which was widely criticized but ultimately upheld by the Supreme Court; local critics, including the leadership of Community Board 9 (which tried to ban eminent domain and voted unanimously against a Community Benefits Agreement with Columbia in May 2009), had to accept it as a “reality.” The leadership of CB9 changed hands and adopted a more collaborative stance toward Columbia. NY State Assemblyman Keith Wright echoed the feelings of many at the time: “If my constituents can make some money off of it, it is good. If my constituents can benefit, it is good.”¹¹³

¹¹⁰ Governor Cuomo Announces Modernization and Revitalization Plans For LaGuardia, JFK, Republic and Stewart Airports,’ <http://www.governor.ny.gov/news/governor-cuomo-announces-modernization-and-revitalization-plan-laguardia-jfk-republic-and>.

¹¹¹ The Port Authority of NY & NJ, ‘Master Plan Design Competitions For LaGuardia and JFK Airports,’ http://www.panynj.gov/airports/pdf/jfk_laguardia_master_plan_design_competitions.pdf, p. 3.

¹¹² <http://www.panynj.gov/airports/lgareimagined/>. One other firm that was also invited was later disqualified because of violations.

¹¹³ Robin Simpson McKay, ‘CB9 chair encourages cooperation in M’ville meeting,’ *Columbia Spectator*, January 28, 2011, <http://columbiaspectator.com/2011/01/28/cb9-chair-encourages-cooperation-in-mville-meeting/>.

After years of struggle on the part of the displaced businesses, local grassroots activists of the Coalition to Preserve Community, and MWBEs over the terms of the expansion, including MWBE benefits, Columbia pledged to “use good faith efforts to cause” the construction manager to award “at least” 35% of the total dollar value of Phase I Site Development subcontracts to minority-, women-, and local-owned companies (M/W/LBEs) – excluding “Specialty Construction Services and related construction materials.” It also committed to the same 35% goal for non-construction contracts (excluding academic and research) to be awarded to M/W/LBEs “throughout the life of the Project”, with “Local” in this case defined to include NYC’s five boroughs. As to employment, CU committed to “good faith efforts towards a goal to have the construction workforce composed of 50% M/W/L over the life of the Project;” it also promised good faith efforts to cause the Construction Manager to have “at least” 40% of the Project Area Construction Workforce (i.e. employees of contractors and subcontractors) to be “qualified M/W/L” (again, excluding “certain Specialty Construction Services and related construction materials”).¹¹⁴

The CBA states specifically that “to the extent that a provision is not explicitly an obligation of CU but rather a goal, that provision is unenforceable by the WHLDC.” The General Project Plan (GPP) included the hiring of an “Independent Monitor” – funded by Columbia – “who will ... review and take steps to ensure Columbia complies with the commitments made in this GPP.”

However, some of those who acquiesced to the expansion soon found themselves protesting in the streets against what they saw as Columbia’s failure to live up to its CBA commitments. Black architects, in particular, felt that they were shut out of Manhattanville’s contracting. Arch527, a group of African-American architects in Harlem, said that they were offered contracts for such types of work as moving a piece of furniture a few feet. In the words of a company’s architect, Kevin Barnes, Columbia is “used to dealing with janitorial services and low-level construction jobs, but if you are a professional with services to offer, you are invisible in plain sight.”¹¹⁵ Columbia responded to them that professional services were not included under the CBA. At this point, Larry English, CB9 Chair in 2009-2011, who was initially viewed as a supporter of Columbia, sided with the protesters, stating that “local and minority architects have not been given a fair opportunity to work on that project.” He charged Columbia with reneging on CBA: “As an attorney, I have read the CBA and General Project Plan (GPP) and I have no doubt that not only architectural, but all other professional services are a part of the Minority Women Business Enterprise (MWBE) goals in both documents.” Tellingly, even after he ceased to be CB9 chairman, Community Board under the new leadership of Rev. Georgiette Morgan-Thomas – the third chairperson in 3 years – continued to be critical of CU compliance; in March 2013, it unanimously passed a resolution calling for a state audit of Columbia’s promises. CB9 members noted in particular the fact that “specialty” construction excluded from Columbia’s commitments turned out to be a very large portion of the total.¹¹⁶ “We want to ensure we are getting exactly what we are supposed to be getting as a community,” said Rev. Morgan-Thomas.¹¹⁷

¹¹⁴ “West Harlem Community Benefits Agreement,” May 18, 2009, <http://gca.columbia.edu/files/gca/content/pdf/CBAAgreement.pdf>.

¹¹⁵ Jeff Mays, ‘Black Architects Say Columbia Shut Them Out of \$6.3 Billion Harlem Corpus,’ DNAInfo, December 18, 2012, <http://www.dnainfo.com/new-york/20121218/west-harlem/black-architects-say-columbiashut-them-out-of-63-billion-harlem-campus>,

¹¹⁶ Casey Tolan, ‘CB9 calls for audit of Columbia’s Manhattanville commitments,’ *Columbia Spectator*, March 22, 2013, <http://columbiaspectator.com/news/2013/03/22/cb9-calls-audit-columbias-manhattanville-commitments>.

¹¹⁷ Jeff Mays, ‘CB9 Calls for Audit of Columbia’s Promises to West Harlem Community,’ DNAInfo, March 22, 2013, <http://www.dnainfo.com/new-york/20130322/west-harlem/cb9-calls-for-audit-of-columbias-promises-west-harlem-community>.

Another part of the problem was with the group formed to sign the CBA on behalf of the community and to make sure it was implemented, West Harlem Local Development Corp. (WHLDC): it failed to set its business straight for quite a while and ended up under State Attorney General's investigation after spending \$400,000 of the money it received from Columbia on consultants and only \$300,000 on summer jobs programming. After WHLDC was succeeded by WHDC, West Harlem Development Corporation, a well-functioning entity, its present leadership joined the chorus of CU's critics. Thus, its Executive Director Kofi Boateng noted the lack of transparency in CU reporting about its allegedly successful compliance with the CBA goals: "I'm an accountant and I haven't seen what's behind these numbers."¹¹⁸

"The West Harlem Local Development Corporation should immediately hire a law firm to audit Columbia's compliance to the CBA and take appropriate action to bring Columbia into compliance. The community should insist the Empire State Development Corporation do the same with the GPP," wrote Larry English in a moving post on his personal blog. "Today, the redlines no longer surround neighborhoods, but instead they circle the city's mega projects such as Barclay, Hudson Yards, World Trade Center, Second Avenue subway line and Manhattanville like a medieval moat. A barrier built on a mixture of race and greed that says to professionals of color - you need not apply."¹¹⁹ On 1/30/2013, he wrote a letter to the Empire State Development Corporation Commissioner, charging Columbia with "unilateral retrenchment from its obligations". Specifically, the independent monitor envisioned in the GPP had not been brought in yet; and Columbia, while claiming it had exceeded its M/W/LBE promise, was being charged with not publishing any verifiable proof of it.¹²⁰

On the same date, in response to a prior letter by a City Council candidate Vincent Morgan, ESDC stated that it was "monitoring" Columbia and "had taken steps to confirm that minority hiring goals Columbia agreed to were being met," by having asked the university "to present additional information in part directed at providing the requisite information in a format and manner that will permit ESD to assess compliance more readily."¹²¹

While this drama has been playing out, money has also been made. One of the biggest beneficiaries of Columbia's contracting choices is not even a US-based large white-male-owned company. Instead, it is Lend Lease, based in Sydney, Australia, commissioned to provide "preconstruction and construction management services," including "extensive demolition, slurry wall, and foundation work."¹²² The amount of the contract is \$122 million. As a side note, in 2012 – 5 years into its contracting agreement with Columbia - Lend Lease plead guilty to defrauding clients and misrepresenting the work that it did as being done by MWBE businesses.¹²³

On the bright side, a major subcontractor of construction management for Lend Lease for the entire length of the project is McKissack & McKissack, one of the oldest, leading, and most respected MWBEs in the country. The firm has also been involved in recent efforts that are making CU reporting more transparent and accessible to the public.¹²⁴

¹¹⁸ Ibid.

¹¹⁹ Larry English, 'Why We Should Care,' In Plain English, January 6, 2013, <http://freeyourmind2008.blogspot.com>.

¹²⁰ <http://library.constantcontact.com/download/get/file/1102801309313-137/Larry+English>.

¹²¹ Jeff Mays, 'State to Review Minority Hiring at Columbia Expansion Project,' February 4, 2013, <http://www.dnainfo.com/new-york/20130204/west-harlem/state-review-minority-hiring-at-columbia-expansionproject>.

¹²² <http://www.lendlease.com/americas/united-states/projects/columbia-universitymanhattanville?take=1&q=P2V2PTIsMCZrZXk9TmV3JTlW9yaw==>. It is worth noting that of the three largest development players in NYC construction market – Skanska, Lend Lease, and Related – two (Skanska and Lend Lease) are foreign companies.

¹²³ Finn Vigeland, 'Construction firm to pay over \$50 million in fraud settlement,' *Columbia Spectator*, April 24, 2012, <http://columbiaspectator.com/2012/04/24/construction-firm-pay-over-50-million-fraud-settlement>.

¹²⁴ Vivian Marino, 'The 30-Minute Interview: Cheryl McKissack Daniel,' *New York Times*, February 12, 2013, http://www.nytimes.com/2013/02/13/realestate/commercial/an-interview-with-cheryl-mckissackdaniel.html?_r=0.

A major report on non-specialty construction expenditures in Manhattanville for 2008-2014, issued in September last year, shows that CU has indeed been able to nearly reach the target, by allocating 34% of its total \$35.9 million non-specialty construction spending to minority-, women- and locally-owned firms (MWLs). Of these, circa 11 percent went to minority- and circa 8 to women-owned firms. The report also contains separate data for the third quarter of 2014 – just before its release – with surprisingly higher figures for both MBEs (16%) and WBEs (26%), undoubtedly a major improvement. The report also indicates that M/W/L “workforce hours” comprised 55% of total workforce hours employed in Manhattanville non-specialty construction in 2008-2014.¹²⁵

Yet another major project with Lend Lease involvement is the **JFK Airports Delta Terminal Redevelopment Project**. Here, the Lend Lease contract was to manage “the \$185 million, 255,000 sf expansion and renovation of Terminal 4 (T4) Headhouse at John F. Kennedy International Airport in NY on behalf of Delta Air Lines. This work represents a large portion of Phase One of the JFK/IAT Redevelopment Program.”¹²⁶ Meanwhile, The Regional Alliance for Small Contractors reports that “For Phase 1A and 1B of the Delta Terminal Redevelopment M/W/LBEs by mid-2013 received \$140 million.” Thus, Lend Lease sole contract on the project was over 30 percent larger than all of the M/W/LBE contracts combined. It remains to be seen whether the new Master Plan Design Competition for JFK redesign announced by Governor Cuomo will yield better results in terms of M/WBE participation

The third significant undertaking under Port Authority’s auspices is the **redevelopment of the George Washington Bridge Bus Station (GWWBS)**. The project’s total cost is \$183 million, of which \$36 million was allocated in PANYNJ 2015 budget. The project’s official contract goal is 12 percent for MBE and 5 percent for WBE participation – none of which, predictably, is mandatory.

Other M/WBE-relevant projects include:

- **Willels Point Development** – an approximately 60-acre site that according to the city master plan of 2008 “would include 1 million square feet of retail shops and restaurants, 500,000 square feet of office space, 5,500 units of housing, a school and convention center in an area often described as blighted.” NYC’s Economic Development Corporation and Queens Borough President set participation goals for this project at 20 percent for MBEs, 10 percent for WBEs, and 15 percent for Queens-based firms.¹⁰⁶ In addition, the project includes a \$500,000 fund to be used toward M/WBE capacity building.
- The sale of **Long Island College Hospital (LICH)** by The State University of New York (SUNY) to Fortis Property Group for \$240 million. The process that led to the sale was severely criticized by many government officials as well as community groups (led by Mobilizing Preachers & Communities of the Rev. Dr. Johnnie Green Jr., pastor of Mount Neboh Baptist Church in Harlem). Among other things, SUNY bypassed the two highest-ranked bidders – both minority-owned (Brooklyn Health Partners, whose proposal included the preservation of a full-service hospital; and the Peebles Corp. owned by Don Peebles, the latter, in turn, having promised to give half of the jobs on this development to other M/WBEs¹⁰⁷) – to sell it to a white male-owned company that ranked third.¹⁰⁸

Outside of the public sector, an important construction project is the **Hudson Yards** – the reconstruction of the area between West 30th and West 34th Streets from 10th to 12th Avenue, managed by Related Companies and Oxford Properties Group. On its website, Hudson Yards is presented as “the largest private real estate development in the history of the United States and the largest development in New York City since Rockefeller Center.”¹²⁶ The final plan envisions not only office buildings, restaurants, shops, and upscale residences, but also a public school. The project enjoys the benefit of massive city subsidies, which began in 2005 with the City Council approval of \$3 billion in bonds to finance a subway extension in the area via the Hudson Yards Infrastructure Corp. As reported by Daily News, by the end of 2014, the city would have paid nearly \$650 million in debt service subsidy and cost overruns for the project, with further payments anticipated until at least 2019.¹²⁷ Yet there has been no mention of any M/WBE participation requirements – as subsidies even this large do not place the project under the City’s LL1 provisions. This clearly points to the insufficiency of the current definition of the ‘bidder’ in LL1.

* * *

In his interview for this report, Joe Coello was asked, “What if things were reversed and minorities had the upper hand, wouldn’t we do the same thing? Hire several minority companies?” His response: “We have always come out of a suffering, we have always come out of an unfair process. And I think fairness has always been in us, I don’t think I would hold the race of people against them, in order to elevate my own people. It’s not in me, it’s not in us as a whole.”

¹²⁵ ‘Manhattanville MWL Workforce and Spending Summary,’ http://manhattanville.columbia.edu/sites/default/files/content/2015.01.15_mwL_report_redacted.pdf.

¹²⁶ <http://www.hudsonyardsnewyork.com/the-story>.

¹²⁷ Juan Gonzalez, ‘Gonzales: Unfinished West Side commercial development costs taxpayers \$650M,’ *New York Daily News*, November 19, 2014, <http://www.nydailynews.com/new-york/west-side-commercial-development-costs-taxpayers-650m-article-1.2015834>.

VI. Conclusion: DEMANDS FOR ECONOMIC JUSTICE¹²⁸

- New York State and New York City governments must establish M/WBE contracting requirements that provide for a mandatory inclusion of 35 percent of the total contracting budget; likewise, “second-tier” contracting, i.e. subcontracting by larger firms that have contracts involving taxpayer dollars, should have a mandated minimum of 35 percent of M/WBE participation.
- Chapter 862 of New York State Laws of 1990 and New York City Local Law 1 must be amended to provide equitable access for M/WBEs to ‘sole source’ or ‘specialty’ contracting opportunities.
- Federal Government must encourage the establishment of Chief Diversity Officer positions, along the lines of the New York State and New York City Comptroller’s Office positions, in other cities and states that have set goals for M/WBE participation. Chief Diversity Officers are needed to supervise M/WBE-related programs, ensure their access to necessary resources, and stay on top of essential M/WBE needs. To maximize efficiency, these officials’ duties should be entirely focused on M/WBEs.
- NY State and NYC Chief Diversity Officers must monitor M/WBE contracts to ensure that they are being upheld by all parties and that M/WBEs are truly completing the projects in which they are assigned, to minimize the chances of contractors signing M/WBEs on to projects only to pass the contracts over to other businesses half way through to complete the job.
- New York State and New York City contracting offices must revamp the bidding process to maximize openness and transparency in access to information about available government projects from the very start of the process, i.e. before their approval.
- Any for-profit company that is granted tax privileges or breaks from city or state government must be subject to legal requirements of M/WBE participation in the subcontracting of any of its projects. (Thus, the definition of the “bidder” in NYC Local Law 1 of 2013, §6-129 (c)(4) must be amended to include any individual or entity seeking to be in a contract with the City involving public spending, public funding, and/or public incentives, including tax credits or waivers through which the City forgoes its normal taxes and fees).
- NYC Local Law 1 of 2013 must also be amended to establish M/WBE requirements for all all city agencies, authorities, commissions, etc. (as opposed to the 34 mayoral agencies currently covered by the law).
- DMWBD and SBS must provide legal and other assistance to M/WBE contractors whose payments are delayed. The State’s Prompt Payment Law passed in 1998 seems not to be well implemented or not sufficient, given that payment delays are the most frequently mentioned by M/WBE owners as a key problem. Payment must be given no later than 60 days into the project. Contracting agencies should be assisted with getting rid of their bad habits of not paying on time or in a reasonable manner. NYC should consider adopting the Los Angeles practice of withholding payment from prime contractors for non-payment of their subcontracting obligations.

- New York State and New York City legislatures must address the lack of M/WBEs start-up capital by instituting the use of 1 percent of NY State and City pension funds to provide a funding pool for M/WBEs from which they would be eligible to obtain a loan or a grant for the period of waiting for their contract payment to arrive.
- New York State and City authorities must include representatives of minorities' and women research institutions among other key stakeholders in developing M/WBE policies, including drafting recommendations for the upcoming State and City Disparity Studies.
- NYC Mayor's Office must establish an M/WBE Advisory Council comprising all key stakeholders. The Advisory Council must be involved with the work on the City Disparity Study, by providing input from the beginning to the end of the process.
- Data and statistics on MWBE participation must be made more transparent and easily accessible to the general public, as well as more detailed. This includes the breakdown of WBEs and their participation rates by race and ethnicity. NYC Mayor's Office must issue an annual report on the state of M/WBEs in the city.
- In addition, New York State and New York City governments must include a larger educational component in their M/WBE assistance programs, to help new companies reduce their learning curve. This educational component should involve the more successful and established M/WBEs in the mentorship system, more extensively than under SBA's currently existing Mentor-Protégé Program. State and city agencies should institute a system of recognition and rewards for established M/WBEs that partner with the younger generation to share their experience and help them grow.

¹²⁸ For the list of amendments proposed by us for NYC Local Law 1 of 2013, see Exhibit B.

CHARLES B. RANGEL
13TH CONGRESSIONAL DISTRICT
New York

COMMITTEE:
WAYS AND MEANS
JOINT COMMITTEE
ON TAXATION



GEORGE H. HENRY
CHIEF OF STAFF

Congress of the United States House of Representatives

September 17, 2014

The Honorable John J. Degnan
Chairman
Port Authority of New York/New Jersey
225 Park Avenue South
New York, New York 10003

Re: DBE/MBE Participation on La Guardia Central Terminal Project

Dear Chairman Degnan:

As Dean of the New York Congressional Delegation, I would like to bring to your attention the importance of DBE/MBE participation on the La Guardia Central Terminal Project (LCT). As one who has worked on infrastructure issues for our great city during my forty year tenure in Congress, I understand what the importance this project means to the growth of our city, which will be a financial boon for the metropolitan area, creating nearly 15,000 jobs and roughly \$4.5 billion in economic activity throughout the region.

The \$3.6 billion makeover that includes a three-level, 1.3-million-square-foot new beaming terminal will be one-third larger than the current existing 50-year-old facility - insuring that La Guardia Airport remains an important global transportation hub in the 21st century.

Again, the La Guardia Central Terminal Project will translate into thousands of jobs and numerous contracting opportunities for our city residents, and therefore I am urging that the project contract not be awarded without minimally the inclusion of a 35% DBE/MBE participation. No winning bid should be issued a contract without showing that it has made more than a good faith effort to add 35% DBE/MBE partnership not only for construction but for soft costs such as operations, financing and design contracts.

It is crucial that every facet of this project meet federal DBE and state MBE goals. Diversity must be emphasized on the team selected to build and design this project. Atlanta, New Orleans and Washington, D.C. have taken the lead to increase DBE/MBE goals and New York City should not be in default. In a city as diverse as New York, working together we can achieve unprecedented results.

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Page 2 of letter to Chairman Degnan.

I stand ready to assist in what undoubtedly could be an historic turning point for New York City and indeed the entire tri-state area as it relates to minority and women owned businesses. I look forward to speaking with you in an effort to begin dialogue to assist the Port Authority of New York/New Jersey in achieving these important and necessary goals to add 35% DBE/MBE participation in the La Guardian Central Terminal Project. I can be reached at (202) 225-4365 in my Washington office or at (212) 663-3900 in my New York office.

Sincerely,



CHARLES B. RANGEL
Member of Congress

Cc: Congressman Bill Shuster
Chair, Congressional Transportation & Infrastructure Committee

FAA Administrator Michael P. Huerta

Honorable Andrew M. Cuomo, Governor of the State of New York

Honorable Bill De Blasio, Mayor of the City of New York

CBR:ge

Exhibit A

September 17, 2014

The Honorable John J. Degan
Chairman
Port Authority of New York/New Jersey
255 Park Avenue South
New York, New York 10003

**RE: Letter of Support For Congressman Charles B. Rangel
Statement on LaGuardia Airport's Central Terminal Building,
dated September 17, 2014**

Deliver By Certified Mail Return Receipt, Regular Mail and Facsimile

Dear Chairman Degan

I am writing you to express Mobilizing Preachers & Communities' (MPAC) strong and unqualified support for Congressman Charles B. Rangel's stated position on the contract award to replace the LaGuardia Central Terminal Building (CTB) in his letter to you, dated September 17, 2014. MPAC represents over 300 ministers statewide, whose mission is expanding business opportunities and jobs for New York City's minority communities.

We endorse Congressman Rangel's position that the CTB project "should not be awarded" to any corporation, joint venture or consortium that does not have a minimum 35 percent MWBE/DBE goal for prime partners on their Equity, Operation, Financing, Design and Build teams. Furthermore, we agree with Congressman Rangel that a 35 percent MWBE/DBE goal is consistent with MWBE/DBE goals at other major airport projects that have been built or are presently under construction. For instance, Atlanta, New Orleans and Philadelphia have all set at least a 35 percent MWBE/DBE goal on their major airport expansions.

Additionally, we are deeply troubled at the Port of New York & New Jersey (Port) lack of emphasis of MWBE/DBE goals in its *Request For Qualifications* (RFQ) dated October 26, 2012. The Port states only vague reference that there will MBE and DBE goals moving forward.

This is wholly inconsistent with other airport projects across the country. Our review of those projects demonstrate that the RFQ's and/or RFP's spell out strict MWBE/DBE goals in initial stages of the award process. And the awarding agencies clearly state in public announcements, private interviews with potential bidders and project documents that including MWBE/DBE prime partners will enhance bidders opportunities to ultimately win the project.

We anticipate that the Port will justify deemphasizing MWBE/DBE participation in the RFQ process on an unfounded notion that local MWBE/DBE firms lack experience and capacity to participate on a complex project of this nature. We know first-hand that in New York there are many minority firms in the financial, design and build industries that are more than capable of playing a significant role on the CTB project. Unfortunately, the greatest factors to minority business expanding capacity are not "experience," "technical" and "financial" issues, but the primitive viewpoint that too many state agencies continue to hold toward New York's minority business community.

Moreover, the prevailing quote, "*we cannot find anyone*" is no longer acceptable in the year of 2014, in the most diverse city in the world. Furthermore, it is morally, politically and factually indefensible in a city that attracts the top minority professionals from across the globe.

Therefore, we respectfully request that the Port undertake the following:

- (1) Make clear to the teams that are eventually prequalified in the RFQ process that no contract will be awarded without at minimum a 35 percent MWBE/DBE prime partner at every level;
- (2) The RFP will spell out clear 35 percent MBE/DBE goals and those teams that meet or exceed them will increase their opportunity to be selected; and
- (3) That before the Port issues a RFP, it bring on board a nationally recognized MWBE/DBE consultant who has worked on large airport and transportation projects to advise it on the drafting of the RFP to ensure that the Port's MWBE/DBE goals are met.

MPAC would like to again acknowledge Congressman Rangel for his leadership in this matter. And although our words may not be as eloquent as the Congressman, we match him in passion on this issue. Therefore, MPAC pledges that it will bring the full support of its organization behind Congressman Rangel's efforts to ensure full MWBE/DBE participation at new CTB terminal.

Working together we can make this a transformational project for all of New York.

With warmest regards,



cc Congressman Bill Shuster
Chair of Congressional Transportation & Infrastructure Committee

FAA Administrator Michael P. Huerta
Honorable Andrew Cuomo, Governor State of New York
Honorable Bill De Blasio Mayor of New York
Honorable Hazel Dukes, State NAACP President New York

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THE SENATE
STATE OF NEW YORK



ADRIANO ESPAILLAT
SENATOR
31ST DISTRICT

RANKING MINORITY MEMBER
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COMMITTEE MEMBER
CODES
ENVIRONMENTAL CONSERVATION
HIGHER EDUCATION
INSURANCE
FINANCE
JUDICIARY
RULES

December 10, 2014

The Honorable John J. Degan
Chairman
Port Authority of New York/New Jersey
255 Park Avenue South
New York, New York 10003

**RE: Letter of Support For Congressman Charles B. Rangel Statement on
LaGuardia Airport's Central Terminal Building, dated September 17, 2014**

Deliver By Certified Mail Return Receipt, Regular Mail and Facsimile

Dear Chairman Degan:

I am writing you to express my support for Congressman Charles B. Rangel's stated position on the contract award to replace the LaGuardia Central Terminal Building (CTB) in his letter to you, dated September 17, 2014. As a member of the Governor's Commission On Diversity, I and other African American and Latino political and business leaders share Congressman Rangel's desire that the CTB project should be built with maximum MBE/DBE and MWBE participation at the prime level.

I agree with Congressman Rangel's position that the CTB project "should not be awarded" to any corporation, joint venture or consortium that does not have a minimum 35 percent MWBE/DBE goal for prime partners on their Equity, Operation, Financing, Design and Build teams. Furthermore, a 35 percent MWBE/DBE goal is consistent with MWBE/DBE goals at other major airport projects that have been built or are presently under construction. Atlanta, New Orleans and Philadelphia have all set at least a 35 percent MWBE/DBE goal on their major airport expansions.

I am concerned that the Port of New York & New Jersey (Port) lack of emphasis of MWBE/DBE goals in its *Request For Qualifications* (RFQ) dated October 26, 2012. However, this can be corrected by insuring that the final contract with the winning consortium not be signed until 35 percent representation at the prime level be achieved.

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FINANCE
JUDICIARY
RULES

Working together we can make this a transformational project for all of New York.

With warmest regards,

A handwritten signature in black ink, appearing to read "Adriano Espallat".

Adriano Espallat
State Senator

AE:ab

cc: Congressman Bill Shuster
Chair of Congressional Transportation & Infrastructure Committee
FAA Administrator Michael P. Huerta
Honorable Andrew Cuomo, Governor State of New York
Honorable Bill DeBlasio Mayor of New York
Honorable Hazel Dukes, State NAACP President New York

RANKING MINORITY MEMBER
SOCIAL SERVICES
CIVIL SERVICE & PENSIONS

MEMBER
ALCOHOLISM & DRUG ABUSE
BANKS
COMMERCE, ECONOMIC DEVELOPMENT &
SMALL BUSINESS
LABOR
VETERANS, HOMELAND SECURITY &
MILITARY AFFAIRS

THE SENATE
STATE OF NEW YORK



JAMES SANDERS JR.
SENATOR, 10TH DISTRICT

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December 17, 2014

The Honorable John J. Degan
Chairman
Port Authority of New York/New Jersey
255 Park Avenue South
New York, NY 10003

Re: Letter of Support for Congressman Charles B. Rangel's Statement on LaGuardia Airport's Central Terminal Building, dated September 17, 2014

Dear Chairman Degan:

I am writing this letter in support of Congressman Charles B. Rangel's recommendation for thirty-five (35%) percent participation of DBE/MWBE's on the LaGuardia Central Terminal construction project.

As the first African American Chair on the Economic Development Committee at New York City Council, I understand the importance of diversity and inclusion of new opportunities for minority owned businesses in order to balance and sustain the growth of our local economy. The LaGuardia Central Terminal construction project is forecast to create approximately 15,000 jobs. This is a critical component considering the structural unemployment factor that plagues minorities and people of color in particular. I sponsored legislation requiring annual reporting of entities entering into contracts with small business services. This mandated the reporting of actual jobs created and retained in connection with any project undertaken by local development corporations; ***Intro 373-A Section 1 Paragraph B of Subdivision 1 of Section 1301 of the New York City charter, amended to provide a report: with regard to projected and actual jobs created and retained in connection with any project undertaken by such local development corporation for the purpose of the creation or retention of job.***

I stand with Congressman Rangel's position that any proposal by any corporation, joint venture or consortium that does not include 35% participation of DBE/MWBE on the LaGuardia Central Terminal project should not be considered for participation on this project.

Working together we can make this a transformational project for all of New York.

Best Regards,

A handwritten signature in black ink, appearing to read "J. Sanders Jr." with a stylized flourish at the end.

James Sanders Jr.
NYS Senator, 10th



HERMAN D. FARRELL, JR.
Assemblyman 71st District

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THE ASSEMBLY
STATE OF NEW YORK
ALBANY

CHAIRMAN
Ways and Means Committee

COMMITTEES
Rules
Black & Puerto Rican Caucus

December 24, 2014

The Honorable John J. Degnan
Chairman, Port Authority of New York and New Jersey
225 Park Avenue South
New York, NY 10003

Dear Chairman Degnan,

I am writing to echo the words of my colleagues who have written you regarding the importance of balanced DBE/MBE participation in the La Guardia Central Terminal Project. As you know, this project will have a significant economic impact on the City of New York, creating an estimated 1,500 jobs and roughly \$4.5 billion in economic activity throughout the region.

This activity presents a significant contracting opportunity for residents of the City of New York, and along with my colleagues I sincerely urge you to include a minimal DBE/MBE percentage of 35 percent, if not more. Further, I join my colleagues in asking that no bid be awarded without the successful contractor showing they have made a good-faith effort to achieve 35 percent DBE/MBE participation for construction, operation, financing and design contracts.

As others have said, it is crucial to the economic health of our communities that every facet of this major project must meet federal DBE and MBE goals. Ours is a diverse City, and I firmly believe that every aspect of this project should reflect that wonderful diversity.

Yours truly,

A handwritten signature in black ink, appearing to read "H. D. Farrell, Jr.", with a stylized flourish at the end.

Herman D. Farrell, Jr.
Member of Assembly



MICHAEL A. BLAKE
Assemblymember
79th District – The Bronx

THE ASSEMBLY
STATE OF NEW YORK
ALBANY

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Veterans' Affairs

TASK FORCE
Puerto Rican/Hispanic
Black, Puerto Rican, Hispanic and
Asian Legislative Caucus

The Honorable John J. Degnan
Chairman, Port Authority of New York and New Jersey
225 Park Avenue South
New York, NY 10003

As Assemblyman of the 79th district in the Bronx, I am writing this letter in support of Congressman Rangel's expressed concern on MWBE/DBE inclusion in the LaGuardia Central Terminal Project dated on September 17 2014. According to sources, the \$3.6 billion redevelopment project is the largest new public-works project in the New York City region and is projected to create nearly 15,000 jobs and \$4.5 billion in economic activity. In an area where there is a great challenge to providing economic opportunities, I understand the importance of diversifying them among minorities. MWBE/DBE inclusion in the LaGuardia Central Terminal Project is vital to the financial gain of New York City's economy.

Although this is a great act by the Port Authority board to redevelop the 50-year old LaGuardia Airport Terminal, echo Rep. Charles B. Rangel's thoughts and views on the importance of MWBE/DBE inclusion. It is crucial that every facet of this project meet federal and state MWBE/DBE goals that include 30 percent participation. Diversity must be the emphasis and while working together we can achieve unprecedented results. In addition, expanding MWBE/DBE participation in this project may lead to other major public capital projects as well.

I hope you understand my thoughts towards the MWBE/DBE inclusion project. Other major metropolitan cities such as Atlanta, New Orleans, Washington D.C. and Philadelphia already have substantial MWBE/DBE participation on its airport and transportation related projects with high representation. Working together towards this goal will provide the LaGuardia Central Terminal Project an opportunity for New York to do the same. There are countless certified MWBE firms who have the capacity to participate in the project and we are happy to help with outreach and awareness. I am happy to meet with the Port Authority leadership to learn more about the MWBE/DBE plan for this project and across all other projects so we achieve the collective goal of economic diversity and opportunity for all New Yorkers.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael A. Blake".



LATOYA JOYNER
Assemblywoman 77th District
Bronx County

THE ASSEMBLY
STATE OF NEW YORK
ALBANY

COMMITTEES
Housing
Social Services
Aging
Consumer Affairs
Insurance

March 2, 2015

The Honorable John J. Degnan
Chairman
Port Authority of New York/ New Jersey
225 Park Avenue South
New York, New York 10003

RE: DBE/ MBE Participation in the LaGuardia Central Terminal Project

Dear Chairman Degnan:

As a recently elected member of the New York State Assembly who represents a Bronx community that has been plagued by unemployment levels substantially above the official national average, I am taking this opportunity to request that your office make its best efforts to ensure the attainment of a 35 percent DBE/ MBE participation rate as part of the LaGuardia Central Terminal Project. As initially outlined by Congressman Charles Rangel in his letter dated September 17, 2014, the 35 percent DBE/ MBE goal is particularly important given the massive size of the multi-billion dollar makeover that the Port Authority is undertaking.

With a reported size in excess of \$3.5 billion, the envisioned investment in the LaGuardia Central Terminal has the potential to dramatically impact more than just the travelers who will utilize the upgraded facilities. Indeed, the project is expected to generate well in excess of \$4 billion in economic activity that will reach well beyond the Queens County venue where it is located. It is critical to maximize the impact of this investment on the overall regional economy and enable businesses that have historically been excluded from large scale projects to effectively compete in what has often proven to be a difficult environment for smaller contractors and sub-contractors.

I thank you in advance for your consideration of this request and look forward to working with your office on matter of shared concern in the future.

Sincerely

A handwritten signature in cursive script that reads "Latoya Joyner".

Hon. Latoya Joyner
Member of the Assembly
77th District, Bronx County

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Exhibit A

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OF

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COUNCIL MEMBER
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PUBLIC HOUSING

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March 3, 2015

The Honorable John J. Degnan
Chairman
Port Authority of New York & New Jersey
225 Park Avenue South
New York, NY 10003

Dear Chairman Degnan,

Small businesses are instrumental to the vitality of this city, but require the patronage of area residents and strategic partnerships in order to thrive.

Minority-, women-owned, and disadvantaged business enterprises, in particular, deserve an opportunity to contribute to the vibrancy of the community they serve because they reflect the diversity that exists within the City of New York.

The redevelopment of LaGuardia Airport's Central Terminal Building, at an estimated cost of \$3.6 billion, is a major project that will bolster one of our city's largest transportation infrastructures, create nearly 15,000 jobs, and generate approximately \$4.5 billion in economic activity across the city. As a Member of the Black, Latino, and Asian Caucus who also chairs the Women's Issues Committee in the New York City Council, I understand and recognize the value of MWBEs and DBEs to the economic vitality of our city. Therefore, this project should include the participation of MWBEs and DBEs at a minimum of 35 percent from the bidding process to the completion of construction.

I join my colleagues in government, primarily U.S. Representative Charles Rangel, to respectfully request your consideration and assurance that through this project, MWBEs and DBEs will become more integral to the economic development of our city and state.

If you have any questions, please do not hesitate to contact my office at (718) 260-9191. I look forward to working with the Port Authority of New York & New Jersey to support the revitalization of the LaGuardia Central Terminal Building to ensure the integration of minority-, women-owned, and disadvantaged business enterprises.

Yours in Partnership,

A handwritten signature in black ink that reads "Laurie A. Cumbo".

Laurie A. Cumbo
Member of the New York City Council

SENATOR RUBÉN DÍAZ
32ND DISTRICT

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STATE OF NEW YORK

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COMMITTEES:
BANKS
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HOUSING CONSTRUCTION
& COMMUNITY DEVELOPMENT
INVESTIGATIONS &
GOVERNMENTAL OPERATIONS
TRANSPORTATION

March 13, 2015

The Honorable John J. Degnan
Chairman
Port Authority of New York and New Jersey
225 Park Avenue South
New York, NY 10003

Dear Chairman Degnan:

This letter is to express my support for the Port Authority's goal to redevelop LaGuardia Airport's Terminal. I join my colleagues in government - including Congressman Charles Rangel - to express the importance for the final contract to only be awarded if there is a minimum of 35 percent MBE/DBE.

The creation of nearly 15,000 jobs that will result from this project will be a tremendous blessing to New York's economy as a whole, and my constituents here in the South Bronx need to be included in this public capital project.

Working together we can make this a transformational project for all of New York.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ruben Diaz', written over a horizontal line.

Senator Reverend Ruben Diaz

cc: Congressman Bill Shuster
Chair of Congressional Transportation & Infrastructure Committee
FAA Administrator Michael P. Huerta
Honorable Andrew Cuomo, Governor State of New York
Honorable Bill deBlasio, Mayor City of New York
Honorable Hazel Dukes, State NAACP President New York

JOSÉ E. SERRANO
15TH DISTRICT, NEW YORK

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<http://serrano.house.gov>

Congress of the United States
House of Representatives
Washington, DC 20515-3215

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GENERAL GOVERNMENT
MEMBER, COMMERCE, JUSTICE, SCIENCE
MEMBER, INTERIOR AND ENVIRONMENT

MEMBER, CONGRESSIONAL
HISPANIC CAUCUS
SENIOR WHIP

February 25, 2015

The Honorable John J Degnan
Chairman
Port Authority of New York/ New Jersey
225 Park Avenue South
New York, NY 10003

Re: DBE/MWBE Participation on LaGuardia Central Terminal Project

Dear Chairman Degnan:

I am writing to express my support for my colleague's -Congressman Charles B. Rangel- recommendation for at least thirty-five percent (35%) Disadvantaged Business Enterprise/Minority and Women-Owned Business Enterprise (DBE/MWBE) participation on the LaGuardia Central Terminal construction project.

This project will have a substantial economic impact on our region's growing businesses by creating an estimated 1,500 jobs and roughly \$4.5 billion in economic activity throughout the New York region. This is the perfect opportunity to include contracting opportunities for many DBE/MWBEs, whose growth and development forms the backbone of our community's economic development.

I stand with all of my colleagues in federal, state, and local government in asking that a winning bid include a commitment to achieve at least 35% DBE/MWBE participation for operation, financing, design, and construction contracts. Many other cities have paved the way in increasing DBE/MWBE contracting, and a city as diverse as New York City has an obligation do the same.

It is vital to the economy of the New York City and the diverse communities that we all represent that every component of this project meets federal DBE and MWBE goals. I urge your full consideration of the inclusion of at least 35% DBE/MWBE participation. Thank you and I look forward to working together to make this a transformational project for all New York.

Sincerely,


José E. Serrano
Member of Congress

FAIR SHARE AMENDMENTS TO NYC LOCAL LAW 1 OF 2013

We call upon NYC City Council to amend LL1 of 2013 as follows:

- 1) Citywide participation goals should be replaced with the requirement of mandatory inclusion of M/WBEs at 35 percent of the total contracting budget. This requirement should apply to all agencies, authorities and commissions.
- 2) A mandated minimum of 35 percent should also be established for subcontracting by the city's prime vendors.
- 3) 'Bidder' should be redefined to include any individual or entity submitting a bid or proposal in response to a solicitation or seeking a share of public funding and/or incentives, including tax credits or waivers through which the City forgoes its normal fees. Thus, any for-profit company that is granted tax privileges or breaks from city or state government must be subject to legal requirements of M/WBE participation in the subcontracting of any of its projects.
- 4) The concept of MBE/WBE/EBE 'graduates' should be removed from the law.
- 5) The law should provide for equal access for M/WBEs to "sole source"/"specialty" contracting.
- 6) Requirements of M/WBE share in a joint venture agreement for the venture to be qualified for a special status with the city should increase from 25 to 35 percent of the total value of the contract.
- 7) An M/WBE Advisory Council, comprising all key stakeholders, must be established by law under the Mayor's Office. NYC Mayor should attend at least one of its quarterly meetings per year.
- 8) Mayor's Office must annually issue a report on the state of M/WBEs in the city.
- 9) Enforcement should include the following in the list of penalties for violation of M/WBE rules by the contractor:
 - Termination of any or all of the Contractor's contracts with the City; and
 - Suspension, debarment, or determination of non-responsibility.



KNOWLEDGE  THE
LEADERSHIP  **BLACK**
COMMUNITY  INSTITUTE

The Black Institute
39 Broadway, New York, NY 10006
www.theblackinstitute.org