

# MWBE Certification: Where Policy Still Struggles to Create Equity

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## Introduction

### What is the MWBE Certification?

- State preferential procurement program (PPP): incentivizes public institutions to purchase 30% of their contracting and sub-contracting from Minority and Women-owned Business Enterprises (MWBEs)
- Its intent: to ensure and promote fair and equal economic participation. It recognizes how systemic discriminatory barriers have, and continue to, disadvantage MWBEs.
- Obstacles to MWBE success: limited access to financing, absence of owner experience, and stereotypes about suitable roles for women and minorities (i.e. bias).
- Finding: this program may still reproduce inequality in economic opportunity, rather than remedy it, due to implementation and placement within a market disinterested in justice and inseparable from bias.

### Get Certified

In order to take advantage of the State's MWBE program, you must first certify your business as a MWBE with the State. With a MWBE certification, you'll enjoy the following benefits:

- You'll be placed on the **certified MWBE directory** where State agencies and vendors looking for subcontractors can reach out to you.
- You won't be subject to the State's competitive bidding requirements for procurements under \$200,000.
- You'll be more likely to be awarded a contract over similarly qualified competitors by an agency or vendor looking to meet their MWBE participation goal.

Apply Online on the Empire State Development website.

### Do Business with New York State

New York State offers many online resources to help you find the State bid opportunity that's right for you and your business. Note that even if your business is too small to bid on the larger contracts the State solicits, many vendors who are the prime contractor are looking to do business with MWBE subcontractors.

Fig. 1: Claims that corporations *want* to work with or feel obligated to support MWBEs (Office of NYS Comptroller 2022)

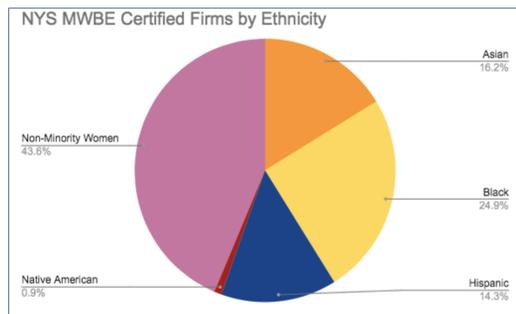


Fig. 2: NYS surpassed the nation-leading 30% goal with 30.51% MWBE utilization. Still, most firms are white women-owned which mirrors disproportionate access in the economy beyond certification by race. (NYS Division of Minority and Women's Business Development Annual Report 2021)

## Program Implementation

- MWBEs are responsible for ensuring requirements are met and for applying for certification, despite potentially lacking the experience and resources to easily do so.
- Tending to be small, MWBEs are employed far less since they don't have the initial capital to competitively secure large contracts requiring more paperwork, insurance, and bonding capacity. "Debundling" contracts can improve inclusion, yet this is not praised as a best practice in our competitive economy.
- Grouping MWBEs together can oversimplify exclusion and undermine group-specific goals.

### Website Usability:

- Websites advertising a program reinforce barriers when technical assistance and networking opportunities are not offered. Poor website usability can indicate the degree of commitment a State feels in alleviating discrimination.
- Only 24% of the 29 states with PPPs offer a form of financial support and 41% have resources for training and business education.
- NYS**: the largest MWBE program in the country with over 5,000 firms listed on the directory.
- Financial resources and credit assistance offered, though larger firms are favored rather than the small, riskier start-ups who need it the most.
- Training/Counseling is offered (i.e. webinars, manuals, e-mail support)
- Networking and Contracting Opportunities are, unfortunately, not listed.
- Restriction for those exceeding \$15 million personal net worth

## Optional Program Participation

### Compliance Rule

Under Executive Law 313(6)(b), State agencies must report waivers of compliance with MWBE State contract goals. Waivers may be granted to offerors and contractors who certify that every Good Faith Effort has been taken to promote MWBE participation in accordance to the requirements set forth under the contract.

Fig. 3: Requested waivers are most often granted on a basis of Good Faith Efforts (Office of NYS Comptroller 2022)

- NYS's MWBE certification program does not ensure equity since it does not actually require corporations doing public sector work to use MWBEs.
- State relies on assumed market demand to work with MWBEs for program success.
- Institutions can and do opt out of MWBE utilization per existing bias and assumed market best practices.

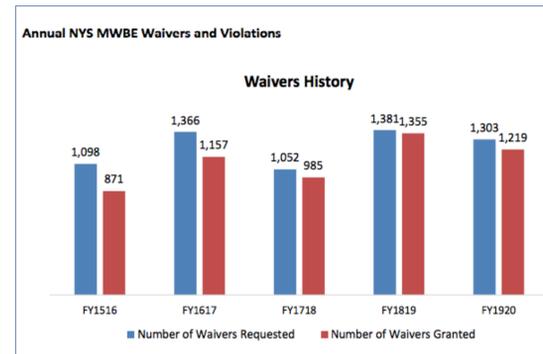


Fig. 4: Each Fiscal Year, institutions request and receive a substantial amount of waivers, citing a lack of identifiable MWBEs who could meet capacity needs (NYS Division of Minority and Women's Business Development Annual Report 2021)

## Taking Advantage of the Disenfranchised

Utilization quotas and requirements for reporting contracting under MWBE programs have proven to capacitate corruption, exploitation and fraudulence in multiple cases, e.g.:

### 1) Schiavone Construction Company L.L.C

- Construction engineering company, awarded multiple million-dollar prime contracts in NYC in 2002 conditional to meeting specified MWBE subcontracting percentages. While they Submitted proof of hiring multiple small MWBEs, they later admitted to hiring them as "pass throughs" to sham compliance while delegating work, and profits, to non-MWBE firms.
- The consequences were light under **non-prosecution agreements** with the State. Schiavone created codes of conduct, removed affiliated management, and paid \$22 million to the State.

### 2) DCM Erectors: *United States v. Davis* (2015)

- Construction company unlawfully used pass throughs under a \$1 billion contract to rebuild the World Trade Center. U.S. District Judges acquitted CEO on the grounds that his agency's desires to meet the contract's 17% utilization goal was merely "aspirational", not a requirement, because of Good Faith Effort.

Violations History	FY1516	FY1617	FY1718	FY1819	FY1920
Number of Waivers Requested	1,098	1,366	1,052	1,381	1,303
Number of Waivers Granted	871	1,157	985	1,355	1,219
Number of Contract Violations	21	36	30	30	35
Monetary Sanctions/Damages from Violations	\$697,755	\$765,610	\$715,298	\$482,436	\$1,592,552

Fig. 5: Contract violations have increased during the COVID-19 pandemic. (NYS Division of Minority and Women's Business Development Annual Report 2021)

Clearly, there are flaws in MWBE program implemented in NYS. Even within a policy conscious of systemic discrimination, institutions have been enabled to opt-out of their responsibility to procure from MWBEs and are not held accountable even for blatant malpractices.

- In failing to adequately punish and correct this corruption, the State undermines their own intentions of ensuring equity and eliminating barriers to economic success.

## Bias

Assumptions on "correct" roles and dynamics regarding gender and race. These frame our regulative (legal/systemic) and cultural (ethical/moral) systems existing within and between political and corporate institutions. Decision-making in institutions is, consciously or subconsciously, influenced by bias that excludes MWBEs.

**WBES:** Patriarchal norms obligate women to fulfill laborious social and familial roles that are then devalued under gender-bias. WBEs report conflict between work and family roles that men in business do not experience as intensely.

**MBEs:** Black and Latin-operated businesses struggle disproportionately to access and retain financing to operate viable businesses due to enduring racial bias. Traditional financing institutions perceive MBEs as risky and MBEs see banks as untrustworthy due to high loan refusal. MBEs are vulnerable to debt as they may rely on personal credit to finance their firm.

**Corporations:** Firms are more likely to contract with unfamiliar male-owned firms over equally, or more, qualified MWBEs due to assumptions that they're second rate and will underperform. In fact, holding a MWBE certification alone may deter contracting as corporations assume helplessness and dependency without considering the prevalence of discriminatory barriers.

## Market Mechanisms

Under Article 11 of the New York State Finance Law, all non-discretionary contracts are subject to a competitive bid process that privileges quality, cost, and efficiency.

- Access still only reserved for large firms
- Incentivizes non-compliance as Institutions seek to contract the lowest responsible bidder: firms best fulfilling bid requirements of capability, reputation, and most advantageous pricing or cost benefit.

- MWBE policy mirrors market mechanisms external to PPP that operate with inflated emphasis on fiscal efficiency and economic growth rather than on development, justice, and the public good.

- PPPs are well-intentioned policies superimposed onto economic, cultural and legislative systems which have operated for decades to maintain inequality and power dynamics favoring whiteness and masculinity. One piece of economic policy can hardly disrupt this systemic sum.

## Conclusion

The objective of the MWBE certification program is to promote equality of economic opportunities for MWBEs and to eliminate barriers to their participation in state contracting. Despite this intention, barriers are in fact reproduced through implementation considering the program's failure to make comprehensive and holistic changes beyond economic policy.

Comprehensiveness would entail women, minority, and minority-women owned firms of all sizes having equal access to economic opportunity with implementation that effectively eliminates inner-program obstacles. Governments with a holistic scope would address bias in and around market mechanisms while prioritizing the protection of marginalized groups. Yet MWBE certification does not strive to achieve this level of equity.

Further research is necessary to deepen our understanding of the MWBE experience and needs, to measure barriers as they operate within and external to PPP and individual policies, and to highlight the multifaceted nature of discriminatory barriers beyond economics in order to create an inclusive socio-political environment.

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