

MWBE CONTRACTING FRAUD CONVICTION SIGNALS SHIFT OF THE ENFORCEMENT LANDSCAPE AND ALERTS COMPANIES TO REASSESS COMPLIANCE

“Those who scheme to defraud minority-owned businesses and their own employees must face the consequences of their actions. My office will continue to prosecute scam artists that try to take advantage of New Yorkers,” said New York State Attorney General Barbara Underwood in a [press release](#).

Attorney General Underwood’s statement follows the December 7, 2018 conviction of [Michael Martin](#), a former Albany, New York contractor, for defrauding minority- and women-owned business enterprises (MWBE), leaving a number of owners and their families financially devastated.

Martin’s scheme was wide-ranging and included “fraudulently obtain[ing] public construction contracts, willfully fail[ing] to pay over \$400,000 in wages to dozens of employees and steal[ing] over \$150,000 from a minority-owned business and over \$200,000 from an insurance company,” according to Attorney General Underwood. The judge ordered [Martin to pay \\$800,000](#) to the victims and, in addition, imposed on Martin a prison sentence of 3.5 to 12 years.

For contractors in the construction field, this should be a wake-up call. The conviction and sentence come almost a year and half after the 2017 Manhattan federal court decision reversing the [2016 convictions of Larry Davis](#) and his company, DCM Erectors. While that Manhattan federal judge may have declined to find criminality in a contractor’s misrepresentations to the government of MWBE utilization on a project because the government suffered “no loss”, the New York State Attorney General is making it clear that predator contractors who exploit the MWBE program and steal from minority contractors will still be prosecuted by the state and may face significant prison terms for their actions.

In the [2017 federal district court case, Davis and DCM](#) were prosecuted under the theory that they had obtained more than \$500 million worth of contracts from The Port Authority of New York and New Jersey by claiming MWBE

participation credits worth millions of dollars when, in actuality, DCM self-performed the work or arranged for the work to be performed by other, non-MWBE contractors. The federal judge overturned the jury's fraud conviction stating the Port Authority got "exactly what it paid for;" the agency's desire to employ more MWBEs was merely "aspirational" and not central to the defendants' contracts; and the defendants' misrepresentations did not go to an essential element of the bargain and did not subject the Port Authority to actual or potential economic harm.

While the indictment in that federal case was not dismissed, the decision may have created the impression in the construction community that the decision could promote less law enforcement focus on fraudulent activity relating to MWBE programs. The New York State Attorney General's prosecution of Martin signals otherwise. The New York State Attorney General's office has obviously made a commitment to prosecute fraud that arises in connection with MWBE participation on projects and the landscape remains dangerous to those who seek to exploit the MWBE program or to take advantage of MWBE contractors.

Key takeaway: For all who partake in projects involving MWBE participation, take notice, and more importantly, take appropriate measures to ensure their projects do not become the focus of a law enforcement investigation or prosecution.

Appropriate measures may include hiring an independent consultant with expertise in the rules and regulations relating to MWBE compliance and familiar with the fraudulent schemes that have been devised to corrupt the MWBE program. Such a consultant will help ensure the integrity of MWBE participation plans and the activities surrounding the participation of MWBE contractors on construction projects.

Such consultants can ensure:

1. Good faith efforts have been undertaken to meet MWBE participation goals;
2. Good faith efforts have been properly documented;
3. MWBE contractors selected to work on projects can perform a commercially useful function; and,
4. Relationships between contractors and MWBE firms have not been corrupted by fraudulent arrangements and schemes.



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Thomas A. McShane directs complex investigations of alleged corrupt practices for corporations in several industries and spearheaded the development of the firm's Integrity Monitorship Program under which Guidepost Solutions has been retained on behalf of

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