

# NEW YORK STATE'S MWBE PARTICIPATION PROGRAM

*"The extension and expansion of New York's nation-leading MWBE program will help ensure our economy is reflective of our values and of our diverse talent pool... and by signing this measure into law we will empower more women and people of color to participate in State contracts and continue our aggressive program to make contracting even more inclusive."*

So said New York State Governor Andrew Cuomo this past summer when he signed into law [legislation](#) renewing for five more years, and expanding, New York State's Minority- and Women-Owned Business Enterprise (MWBE) Program.

This legislation was prompted by the findings of the "2016 Diversity Study" conducted in compliance with [Executive Law 15-A](#) on behalf of New York State to evaluate the participation of MWBEs in government contracting compared to the overall availability of MWBEs in the marketplace. The goal of the Study was to determine whether any race or gender-based disparity exists in New York State contracting. Construction and construction related services were a focus of the Study.

The Study concluded that, although MWBE participation in state contracting had increased significantly since 2010, MWBE utilization was *disproportionately lower* than MWBE availability in every category of state contracting. The Study recommended that the State continue to work to achieve the Governor's 30% MWBE participation goal and undertake new and more targeted efforts to support MWBE contractors.

Based largely upon those recommendations, the new legislation, which will take effect on January 1, 2020, introduces the following notable changes to the State's MWBE program:

- Increase the cap on the personal net worth of business owners eligible for MWBE certification from \$3.5 million to \$15 million.
- Raise State agency and authority discretionary purchasing authority from \$200,000 to \$500,000, thereby permitting state contracts of greater value to be awarded without a formal "request for proposal" process.
- Broaden the authority of the "Statewide Advocate" to include (i) auditing the good faith efforts of individual state agencies to maximize MWBE participation in their contracting and (ii) investigating complaints made by certified MWBEs concerning a State agency's failure to meet its obligations to promote MWBE participation.
- Narrow the bases upon which State agencies may grant waivers of MWBE requirements by removing any

expectation that only MWBE firms located in the region where the state contract will be performed need be solicited to satisfy good faith efforts.

- Increase transparency with respect to the waiver process as a whole by introducing new reporting and publishing obligations.

These changes certainly signal the State's commitment to (i) expanding opportunities for minority and women-owned businesses and (ii) monitoring the efforts of individual state agencies in fulfillment of that commitment.

**For construction firms doing business with New York State, meeting the participation goals of the State's MWBE program has become increasingly challenging; that is especially the case for construction firms involved in complex capital projects.**

For that reason, raising the cap on the personal net worth of eligible business owners to \$15 million should be beneficial. It will not only increase the pool of available MWBE firms, it will likely introduce into the mix MWBE firms with greater capacity – something needed on large and complex capital projects. However, narrowing opportunities for issuance of waivers will not make it any easier for firms to demonstrate their good faith efforts to meet MWBE participation goals, thereby justifying the issuance of a waiver. In addition, based on the trajectory of the MWBE participation goals over the last eight years, we may expect overall participation goals to increase.

In this environment, construction firms involved in public projects in New York State would be well advised to continue to seek guidance from MWBE monitoring and compliance experts as they attempt to meet the evolving goals and expectations of the new legislation, including includes the enhanced oversight of state agency compliance with the state's MWBE program requirements and goals by the Statewide Advocate.

Specifically, with the prospect of a fresh crop of potentially unknown and geographically remote firms entering the pool of MWBE firms being considered for participation on state projects, it will be prudent for companies to take appropriate measures to ensure the bona fides of their MWBE selections, just as it will be wise of them to seek an independent assessment of their subcontracting policies and procedures. This will help to ensure their efforts to reach MWBE participation goals, including their documentation of those efforts, will meet the tightened good faith standards that will now determine the appropriateness of waivers.



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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 government authorities to monitor major capital construction projects and private

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## MARY STUTZMAN

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Mary Stutzman, a business intelligence and investigative professional, has more than 25 years of experience serving Fortune 500 companies and major international law firms. She has participated in several monitorships involving the creation and implementation of compliance policies and procedures and the assessment of compliance activities in a number of different industries. This includes the creation and oversight of a woman and minority business enterprise program at a manufacturing company. Prior to joining Guidepost Solutions, Mary spent several years with a consulting firm that specialized in corporate investigations and business intelligence assignments, including due diligence, litigation support, asset searches, background screening and competitive analysis.