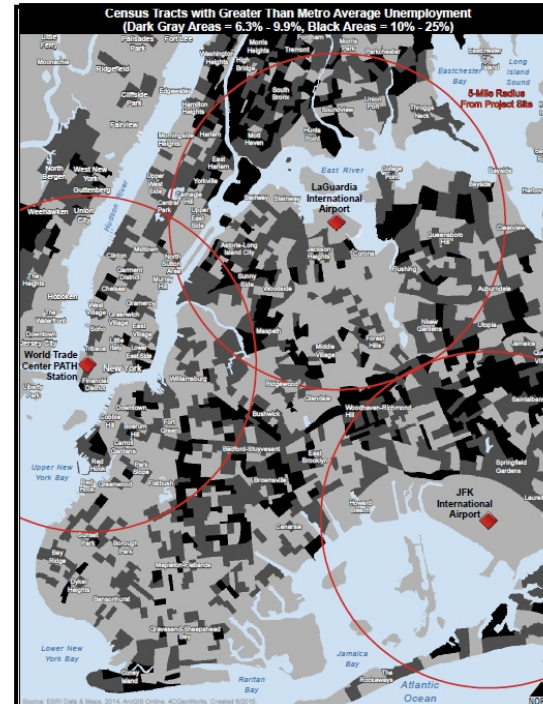


From the NYS Comptroller's Research Brief

State Comptroller, Thomas DiNapoli's office routinely releases findings on M/W/DBE hiring. Here are some of those findings:

- Agencies tend to set low goals, fail to meet even those minimum goals, lack coordinated outreach efforts to identify and utilize certified MWBE firms, and poorly monitor contractor compliance.
- New York completed a disparity study – a study to examine the difference between the availability of MWBEs and their utilization in government procurement – which concluded that MWBEs in New York State are present in substantially lower numbers, 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.
- Although 29 percent of firms were identified as MWBEs in the disparity study, only 5 percent of New York's contracting and purchasing dollars were spent with MWBE firms from State fiscal years 2004 through 2008. The study concluded that the statistical and anecdotal evidence supports the conclusion that these outcomes are the result of discrimination.

Economic Cornerstone is not surprised that agencies set low targets, but we are concerned when even those low targets are not met. The result of these low targets has been reduced demand for MWDBEs, and following the laws of supply and demand, the supply contracts. Logically people would assume that in a shrinking pool of MWBE contractors, most of them would be busy, but that is not the case.



The map above displays New York City census tracts in which the unemployment rate is greater than the city average and this populations proximity to three major PANYNJ sites. Census tracts in which the unemployment rate ranges from 10 to 23 percent are represented by the darkest areas. In 2014 the per capita income in the darkest census tracts was \$18,017.

Unsurprisingly, higher levels the unemployment closely resemble those disenfranchised communities surrounding the three major Public Work sites.

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Economic Cornerstone Spearheads Class Action Lawsuit for MBE Hiring

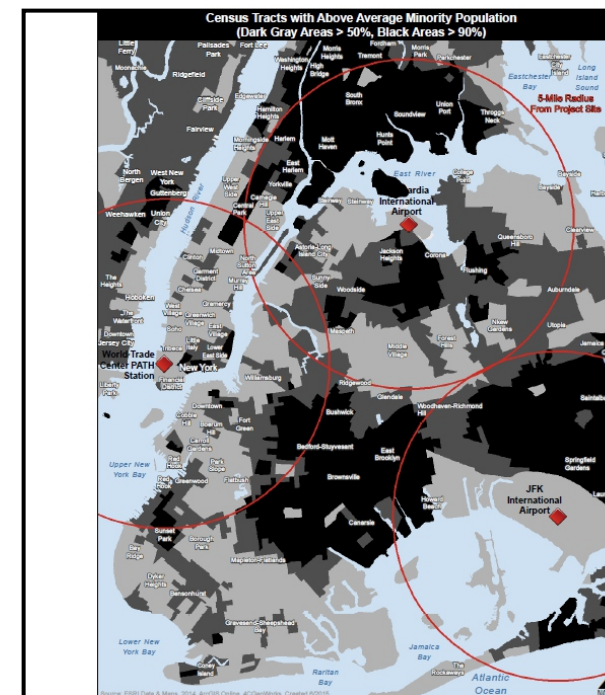
Suit seeks to hold Port Authority Accountable

Economic Cornerstone, a 501.c.4 not-for-profit corporation ensuring minority programs deliver on their promise, launched a class-action lawsuit on behalf of minority and women-owned business enterprises (MWBEs) and their workers against the NYNJ Port Authority. The suit alleges that the Port Authority did not adhere to the affirmative action requirements that were a precondition to accepting federal funds. The suit claims the Port Authority deprived members of the Class the employment opportunities made possible through paid "on-the-job" training programs which would economically elevate them into the ranks of America's middle class.

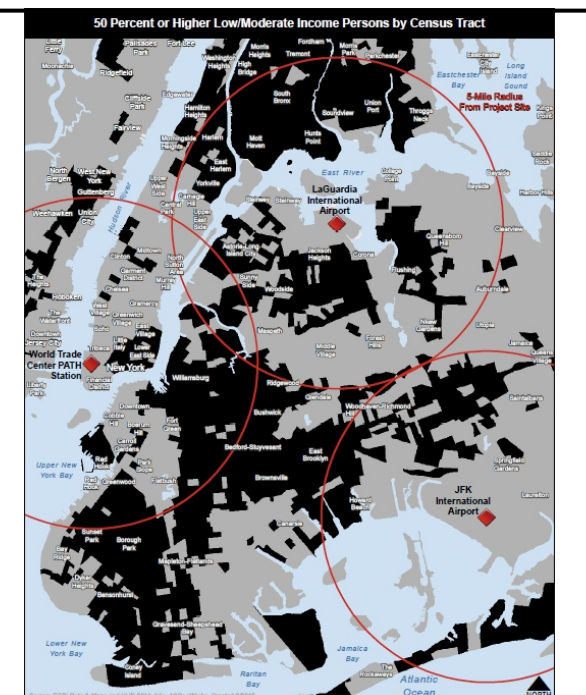
"The nation's largest public works projects are situated either in or around clusters of disadvantaged

communities," said Director of Economic Cornerstone and Class Representative, Carl Evans. "The Port Authority agreed to meet disadvantaged hiring obligations when they accepted money from the federal government and they have failed."

MWBEs are the natural employers of minority populations residing in disenfranchised communities and when MWBEs are excluded from large scale participation on Port Authority projects, these disenfranchised communities continue to suffer from the social ills of poverty, unemployment and reliance on public support. Economic Cornerstone presented maps showing where the monies were spent in relation to the disadvantaged communities as evidence of the Port Authority's the lack of effort and outright failure.



Laws have been in place for decades to assist minority and disenfranchised communities assimilate economically into American society. The vehicle that was supposed to promote this assimilation has been large public works projects, providing apprenticeship training and jobs to those in disadvantaged communities, thus giving them an opportunity to enter the middle class. In these maps we see the minority and



low/moderate income populations in New York City and their proximity to three of the nation's largest public works sites. The public works projects have not functioned to assimilate the minority and disenfranchised communities. The Port Authority, as the agency receiving federal grant funding and overseeing these sites, has failed to live up to the laws intended to benefit these communities.

DBE Suppliers Beware...

The latest enforcement trend focuses on DBE suppliers. Rather than having to explore the nuances of whether a DBE subcontractor did enough work on a project to satisfy the program requirements, investigators and prosecutors have found instances of straight pass-through arrangements where the DBE supplier adds no value and performs no commercially useful function, but instead merely lends its name in exchange for a small percentage of the contract value.

On Sept. 26, 2014, in, United States v. Tubbs, federal prosecutors in the Southern District of New York charged the regional manager at a general contractor that performed a construction project on Bronx-Whitestone Bridge with fraud for allegedly setting up a pass-through arrangement with a DBE supplier. According to the criminal complaint, in October 2008, the Metropolitan Transportation Authority (MTA) awarded a general contractor identified only as “General Contractor-1” a \$192 million contract to repair and replace the approaches to the suspension bridge over the East River. To satisfy the M/WBE goal on this project, General Contractor-1 allegedly claimed, in utilization forms and compliance reports, that structural steel would be supplied by a “certified” MBE supplier, identified only as “MBE-1.” According to the criminal complaint, the defendant, Aaron Tubbs, in his capacity as the regional manager at General Contractor-1, allegedly participated in setting up a fraudulent scheme whereby the structural steel was actually provided by other companies and MBE-1 was used as a pass-through.

According to the criminal complaint, after a supplier agreed to a contract with General Contractor-1, Tubbs informed the supplier that the purchases of structural steel had to be run through MBE-1 for purposes of meeting minority requirements. Thereafter, the complaint alleged that General Contractor-1 received purchase order information from the supplier, arranged for the information to be placed on letterhead of MBE-1, and arranged for the purchase order to be submitted to and fulfilled by the supplier. The complaint alleged that, for these reasons, MBE-1 did not meaningfully participate in the bridge project, and it received only a small fraction of the state funds that General-

Contractor 1 represented it had received.

So What Are the Rules for DBE Suppliers?

A fundamental requirement of every DBE program is that the DBE perform a “commercially useful function,” meaning, in plain terms, that a DBE must actually perform work before its services can be counted toward the DBE goal for a project. The phrase “commercially useful function” comes from the federal Department of Transportation regulations, which define the requirement as follows:

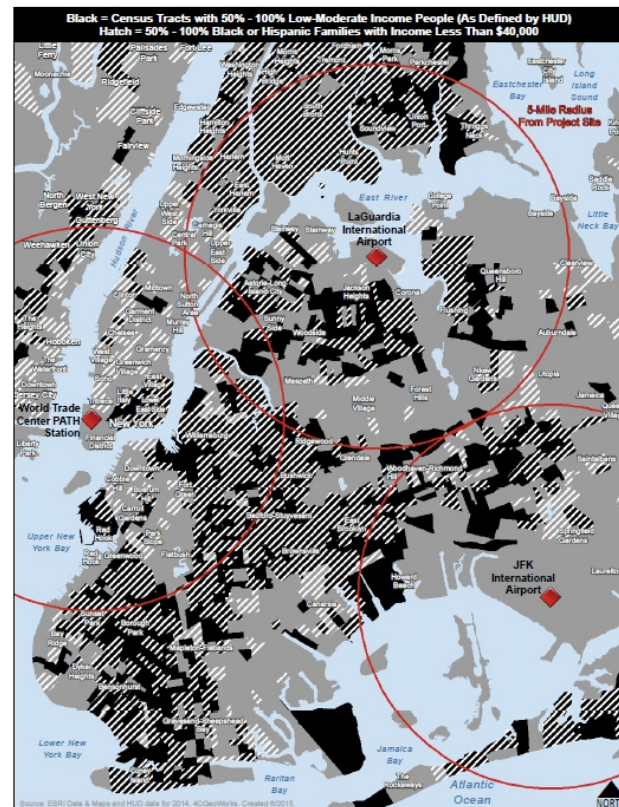
A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. [49 C.F.R. § 26.55(c)(1)]

With respect to materials and supplies used to perform a contract, the DBE must be responsible “for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself.” 49 C.F.R. § 26.55(c)(1). The DOT regulations make clear that a DBE serving as a “pass-through” entity is not sufficient:

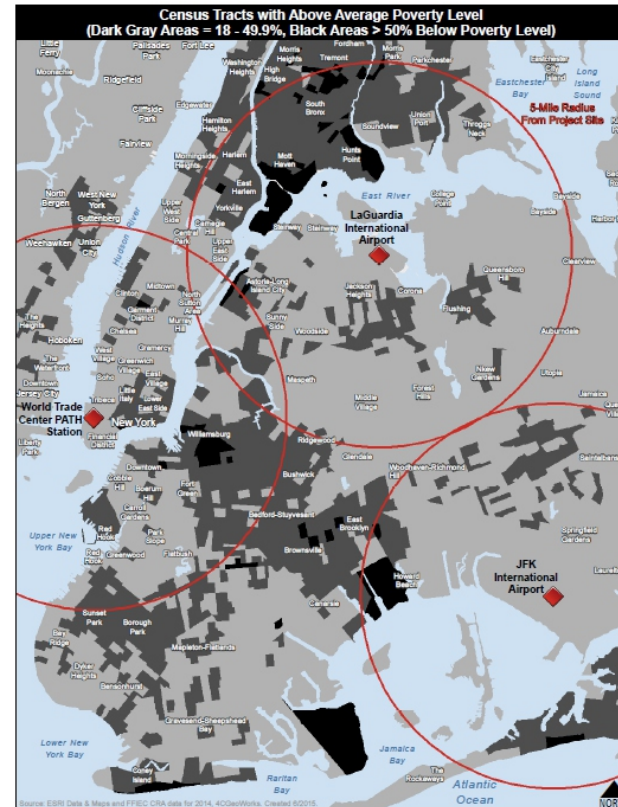
A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. [49 C.F.R. § 26.55(c)(2)]

While other local and state and federal agencies use different phrases for commercially useful function and vary slightly in defining this requirement, the concept is the same: the DBE cannot just be inserted in the transaction and must participate in more than name only.

For more info, visit:
<http://www.law360.com/articles/628122/caught-in-the-middle-disadvantaged-business-fraud>



The map above displays (in black) census tracts in which 50 to 100 percent of the general population is defined by HUD as Low-Moderate income. The census tracts in which black and Hispanic families with incomes less than \$40,000 are represented by the hatch areas. In census tracts containing 50 percent or more Low Moderate income persons, the per capita income was \$18,589 in 2014. Black and Hispanic families have low incomes even in areas that are not more than 50% low-moderate income overall.



The map above displays New York City census tracts in which an above average number of people live below the poverty level and their proximity to three major PANYNJ sites. Census tracts in which more than 50 percent of the population are below the poverty level are represented by the darkest areas. In the darkest census tracts the per capita income in 2014 was \$9,507.

The map to the lower left displays census tracts in which a greater than average (3.9%) number of households are on public assistance and these households' proximity to three major PANYNJ sites. Those census tracts containing 10 to 27 percent of households on public assistance are represented by the darkest areas. The national average of households on public assistance is only 1.76 percent. The per capita income in the darkest census tracts was \$12,771 in 2014. There are 41,048 households on public assistance in this highest group and 44,713 households in the 4% - 9.9% group.

All the traits represented in these maps are indicators of disenfranchisement, and each of these traits, due to the failed implementation of federal equal employment opportunity legislation by the Port Authority, surround public works sites that have been under construction for decades. Yet, economic assimilation continues to elude them.

Support those companies that support us! Without them, our efforts would not be possible. See who they are on the back page of this newsletter and give them a call today.

