

31584

Date: January 9, 2013

To: The Honorable Board of Acquisition and Contract

From: Robert F. Meehan
County Attorney

Re: Authority to amend a short-form contract with William Fitzpatrick, P.E., P.T.O.E. ("William Fitzpatrick") for the provision of expert witness services to the County Attorney in connection with the lawsuit entitled Cesar Calderon v. County of Westchester and Montesano Bros. et al. for a term commencing December 1, 2011 and continuing through November 30, 2012 for an amount not-to-exceed \$19,750, by 1) retroactively extending the term of the agreement from December 1, 2012 through November 30, 2013; and 2) increasing the total amount not-to-exceed thereunder by an additional \$23,375, from an amount not-to-exceed \$19,750 to an amount not-to-exceed \$43,125, to compensate Mr. Fitzpatrick for additional services rendered

On or about March 6, 2012, the County entered into a "short-form" contract with William Fitzpatrick, pursuant to which Mr. Fitzpatrick agreed to provide expert witness services to the County Attorney in connection with the lawsuit entitled Cesar Calderon v. County of Westchester and Montesano Bros. et al. for a term commencing December 1, 2011 and continuing through November 30, 2012 for an amount not-to-exceed \$19,750, payable at the rate of \$250.00/hour for preparation activities and \$2,500.00 per day, or part thereof, for in-court activities (the "Agreement"). The Agreement was subsequently executed.

The Agreement with Mr. Fitzpatrick, which expired on November 30, 2012, allowed for a total compensation of \$19,750.00. Mr. Fitzpatrick was previously paid \$15,625.00 for services rendered up to and including April, 2012. However, from April, 2012 to the present, Mr. Fitzpatrick invoiced the County for an additional \$17,500, thereby bringing the total amount to \$33,125, which exceeds the not-to-exceed amount allowed under the contract.

This case involves a pedestrian accident on a County-owned portion of the Bronx River Parkway which the County was having reconstructed at the time. Over the course of the past year, Mr. Fitzpatrick, a traffic engineering expert, provided invaluable assistance to the County in connection with the preparation of its motion for summary judgment. In addition to moving to dismiss Plaintiff's claims, the County has moved for summary judgment on its cross-claim against

co-defendant, Montesano Bros. Inc., for defense and indemnification seeking recoupment of defense costs, including those paid by the County to Mr. Fitzpatrick pursuant to this agreement.

In order to compensate Mr. Fitzpatrick for services rendered through November 30, 2012 and to continue to retain him should the motion for summary judgment be denied and the matter proceeds to trial, it will be necessary to amend the Agreement in order to increase the not-to-exceed amount by an additional \$23,375, and extend the term of thereof for an additional year.

As your Honorable Board is aware, amendments to short-form contracts which result in increases which exceed the \$20,000 threshold for short-form contracts and/or term extensions beyond the one (1) year threshold, must first be approved by your Honorable Board. Accordingly, authority is respectfully requested to amend the Agreement with William Fitzpatrick for the provision of expert witness services to the County Attorney in connection with the lawsuit entitled Cesar Calderon v. County of Westchester and Montesano Bros. et al, for a term commencing December 1, 2011 and continuing through November 30, 2012 for an amount not-to-exceed \$19,750, by 1) retroactively extending the term of the agreement from December 1, 2012 through November 30, 2013; and 2) increasing the total amount not-to-exceed thereunder by an additional \$23,375, from an amount not-to-exceed \$19,750 to an amount not-to-exceed \$43,125, to compensate Mr. Fitzpatrick for the total amount invoiced to date, as well as any additional services rendered going forward.

This Agreement is exempt from the requirements of the Westchester County Procurement Policy pursuant to section 3(a) vii thereof, which exempts "contracts for the services of expert witnesses for use in, or in anticipation of, an adjudicatory proceeding or litigation."

Except as otherwise specifically amended hereby, all other terms and conditions of the Agreement will remain in full force and effect.

The goals and objectives of this Agreement are to retain the services of an expert in traffic engineering to assist the County in defending itself in a lawsuit.

The goals and objectives are in the best interests of the County in terms of fiscal responsibility because without the assistance of the expert witness, it will be more difficult for the County to defend itself in the lawsuit which could result in a monetary judgment against the County.

The Agreement will be tracked and monitored by the County Attorney's Office.

Accordingly, your favorable action on the annexed Resolution is most respectfully urged and recommended.

RFM/JPG/nn

RESOLUTION

Upon a communication from the County Attorney, be it hereby

RESOLVED, that the County of Westchester is hereby authorized to amend an agreement with William Fitzpatrick, P.E., P.T.O.E. (“William Fitzpatrick”) for the provision of expert witness services to the County Attorney in connection with the lawsuit entitled Cesar Calderon v. County of Westchester and Montesanto Bros. et al, for a term commencing December 1, 2011 and continuing through November 30, 2012 for an amount not-to-exceed \$19,750 (the “Agreement”), by 1) retroactively extending the term of the agreement from December 1, 2012 through November 30, 2013; and 2) increasing the total amount not-to-exceed thereunder by an additional \$23,375, from an amount not-to-exceed \$19,750 to an amount not-to-exceed \$43,125, to compensate William Fitzpatrick for the total amount invoiced to date, as well as any additional services rendered going forward; and be it further

RESOLVED, that except as specifically amended hereby, all other terms and conditions of the Agreement shall remain in full force and effect; and be it further

RESOLVED, that the County Attorney or his duly appointed designee be, and hereby is, authorized to take such action and execute such documents as may be necessary and proper to effect the purposes hereof.

Account to be Charged/Credited

| Fund | Dept | Major Program, Program & Phase Or Unit | Object/ Sub-Object | Trust Account | Dollars |
|------|------|--|--------------------|---------------|----------|
| 615 | 59 | 0689/3310 | 4420/ 01 | | \$23,375 |
| | | | | | |
| | | | | | |

Budget Funding Year(s) 2013 Start Date 1/01/13 End Date 12/31/13
(must match resolution)

Funding Source

\$ 23,375
(must match resolution)

Tax Dollars \$23,375
State Aid _____
Federal Aid _____
Other _____