



**Office of the County Attorney**

13364

Date: August 10, 2010

To: The Honorable Board of Acquisition and Contract

From: Robert F. Meehan  
County Attorney

Re: Resolution to exempt from the Westchester County Procurement Policy an agreement with the law firm of Kaplan Kirsch & Rockwell LLP to provide “of counsel” legal services to the County Attorney in connection with on-going litigation concerning a complaint filed with the Federal Aviation Administration (“FAA”) against the County by a tenant at the Westchester County Airport, pursuant to Section 3(a)xxi thereof

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Authority is hereby requested from your Honorable Board to exempt from the Westchester County Procurement Policy (the “Procurement Policy”) a retainer agreement with the law firm of Kaplan Kirsch & Rockwell LLP (“Kaplan Kirsch”) to provide “of counsel” legal services to the County Attorney in connection with on-going litigation concerning a complaint filed with the Federal Aviation Administration (“FAA”) against the County by a tenant at the Westchester County Airport, in the total not to exceed amount of Thirty-Five Thousand (\$35,000) Dollars, for a one (1) year term commencing on July 26, 2010 and continuing through July 25, 2011.

As your Honorable Board may know, on October 19, 2007, 41North, 73West, Inc. (a tenant at the airport doing business as Avitat Westchester and Jet Systems Inc.) (“Avitat”) filed a complaint with the FAA challenging the County’s long-standing policy of encouraging light general aviation activities and reserving specific facilities for light general aviation, as opposed to corporate and commercial aviation. This challenge strikes at the heart of the County’s ability to determine the use of Airport facilities and manage Airport growth.

In a June 2008 decision, the FAA dismissed Avitat’s complaint, upholding the County’s light general aviation program. Avitat appealed the decision to the FAA’s Associate Administrator. The County, represented by Kaplan Kirsch, presented a detailed legal and factual argument in opposition. On September 18, 2009, the Associate Administrator agreed with the County and denied Avitat’s appeal.

Thereafter, in November 2009, Avitat filed an appeal of the FAA’s final decision to the U.S. Court of Appeals for the Second Circuit. 41 North 73 West, Inc. v. United States

Department of Transportation, et. al., Index No. 09-4810-ag. The County, represented by Kaplan Kirsch, intervened in the appeal to assure that its interests were represented. The principle issue on this appeal is whether the County's light general aviation program is justifiable and is based on a reasonable distinction in the aviation market.

Kaplan Kirsch has appeared on behalf of the County in successfully responding to the 2007 complaint and the 2008 administrative appeal which were denied, and is currently representing the County in the Second Circuit appeal. It is critical that the County submit a brief to the Court in support of its aviation program in order to defend its light general aviation program.

In light of the firm's expertise and experience in Aviation Law and in the interest of continuity, it is imperative that the County continue to retain Kaplan Kirsch to handle the appeal in this matter. Kaplan Kirsch has represented the County throughout this litigation and is uniquely familiar with the nuances of the case. Moreover, since 2003, Kaplan Kirsch has provided the County with a continuing flow of valuable legal counsel that has assisted in the day to day management of Airport affairs. The firm's expertise in FAA processes has assisted the County with its participation in the review of FAA airspace redesign proposals as well as the standardization of language in tenant leases protecting the County from liability due to changing federal regulations.

Ordinarily, under Section 7 (a) of the Procurement Policy, the County is required to solicit written quotations, statements or other information regarding their experience, qualifications and capability to perform the proposed services from no fewer than three persons customarily performing such services. However, pursuant to Section 3(a)xxi, the Procurement Policy is not applicable to any procurement for which this Honorable Board determines, by resolution passed prior to commencing such procurement, that compliance with the policy would not be in the best interests of the County. For the reasons set forth above, it is proposed that the best interests of the County would be served by exempting the procurement of this agreement from the County Procurement Policy.

The goals and objectives of this Agreement will be to protect the Airport's light general aviation program and ensure it is in compliance with all FAA regulations. The goals and objectives are in the best interest of the County by insuring the County's ability to determine the use of Airport facilities and manage Airport growth. The goals and objectives will be tracked and monitored through regular reports to be supplied by the firm detailing the services rendered.

Accordingly, a Resolution to exempt the procurement with Kaplan Kirsch, is hereby submitted for your consideration.

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## **RESOLUTION**

Upon a communication from the County Attorney, be it hereby

**RESOLVED**, that pursuant to Section 3(a)xxi of the Westchester County Procurement Policy and Procedures, it is hereby determined that application of the procedural requirements contained therein, including the necessity of soliciting proposals, is neither cost effective nor expedient, and accordingly, not in the best interests of the County in connection with the procurement of an agreement with the law firm of Kaplan Kirsch & Rockwell LLP for the provision of outside counsel services in connection with on-going litigation concerning a complaint filed with the Federal Aviation Administration against the County by a tenant at the Westchester County Airport.

APPROVED BOARD OF ACQUISITION & CONTRACTS 8-26-2010 - JIMMY VEIR, SECRETARY