

ID # 52978

Date: October 18, 2016

TO: Honorable Members of the Board of Acquisition & Contract

FROM: Robert P. Astorino
County Executive

John M. Cullen
Commissioner of Emergency Services

Re: **Authority to enter into a structured negotiations agreement with Disability Rights Advocates, a National and International Center for the Advancement of People with Disabilities, a/k/a Disability Rights Advocates, a California non-profit benefit corporation (“DRA”) and Westchester Disabled on the Move, Inc.**

Authorization is requested for the County of Westchester (“County”) to enter into a Structured Negotiations Agreement (“SNA”) with Disability Rights Advocates, a National and International Center for the Advancement of People with Disabilities, a/k/a Disability Rights Advocates, a California non-profit benefit corporation (“DRA”) and Westchester Disabled on the Move, Inc., to, among other things, strengthen the County’s emergency preparedness programs and services and ensure compliance with the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12131 *et seq.*, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794; and respond to DRA’s allegations that the needs of persons with disabilities are not adequately addressed in the County’s emergency preparedness programs and services and avoid the need for litigation. By Act approved on October 17, 2016, the Westchester County Board of Legislators authorized the County to enter into the SNA.

By way of background, by letter dated July 10, 2015, DRA writing on behalf of Westchester Disabled on the Move, Inc. advised that they had received complaints about the adequacy of the County’s emergency plans for persons with disabilities. DRA’s letter proposed to resolve these issues by signing a proposed SNA, a draft of which was attached to their letter. As you may be aware, there have been a number of lawsuits alleging discrimination against people with disabilities for a failure to plan for their needs in large scale disasters. Several courts have found that the emergency plans of cities such as New York City and Los Angeles did not meet the requirements of the ADA. Other municipalities have chosen to settle these discrimination cases, including the county of Los Angeles and city of Oakland. In 2015, the city of Phoenix, in partnership with DRA and the Arizona Center for Disability Law, announced a plan to work cooperatively to revise its Emergency Operations Plan.

As you may be aware, the County has conducted a number of activities to address the needs of people with disabilities. The following are just some of the activities: (i) since 2014, the County has undertaken a comprehensive review of all County emergency plans and related documents to identify areas for improvement as such relate to emergency preparedness for people with disabilities; (ii) since January 2015, the County has hosted over a dozen educational, training and inclusive exercise opportunities, including disability awareness training for local first responders, stakeholder workshops and tabletop and functional exercises; (iii) in 2016, the County purchased additional equipment and supplies to make available to support local sheltering efforts as it relates to people with disabilities; and (iv) in 2015, the County established the Disabilities, Access and Functional Needs Emergency Preparedness Advisory Committee, a group composed of County agencies, local service providers, advocates and people with disabilities, which group has been meeting regularly.

Over the last year, members of the Law Department, with input from the County Executive's office, the Departments of Emergency Services, Community Mental Health and the Office for People with Disabilities, have been working cooperatively with DRA to discuss the issues raised by DRA. These discussions have resulted in the proposed SNA which is submitted for your approval.

The proposed SNA, a copy of which is annexed to the Resolution submitted herewith as Exhibit "1", provides that the County will engage a subject matter expert to undertake a number of items, including but not limited to, revising the County's Comprehensive Emergency Management Plan, identifying the needs of persons with disabilities prior to an emergency, assessing and improving the County facilitated public notification and communication for persons with disabilities, develop a shelter-in-place guideline and develop several other policies and procedures in connection with assisting persons with disabilities. In addition, the proposed SNA provides that the County will pay DRA an amount not to exceed Fifty Thousand (\$50,000.00) Dollars for attorneys' fees and costs for all work conducted by DRA prior to the effective date of the SNA, and upon commencement of the SNA the County will pay DRA attorneys' fees and costs not to exceed \$15,000 per month.

Your Honorable Board is advised that, pursuant to 42 U.S.C. Section 12205, a court may allow the prevailing party reasonable attorney's fees, including litigation expenses and costs. In addition, pursuant to the ADA, which is a wide ranging civil rights law that prohibits any state or local government from discriminating on the basis of disability, individuals have a private right of action to enforce an agency regulation.

By way of the aforementioned July 10, 2015 letter, DRA alleges that the County is not in compliance with the ADA. DRA has refrained from filing a claim against the County regarding the County's alleged non-compliance in its emergency preparedness programs and services during the negotiation of the proposed SNA and, pursuant to the terms of the proposed SNA, DRA will refrain from pursuing litigation with the understanding that the parties, subject to necessary legal approval, will enter into a separate settlement agreement. The proposed SNA will take effect upon its execution by all parties and shall continue until a settlement agreement is

executed or if any party to the SNA terminates on notice prior to execution of the settlement agreement.

Accordingly, the attached resolution is submitted for your consideration.

RPA/JMC/TSA

APPROVED BOARD OF ACQUISITION & CONTRACT - 10/20/2016 - LISA MRIJAJ, SECRETARY

RESOLUTION

Upon a communication from the County Executive and the Commissioner of Emergency Services, be it hereby

RESOLVED, that the County of Westchester (“County”) is authorized to enter into a Structured Negotiations Agreement (“SNA”) with Disability Rights Advocates, a National and International Center for the Advancement of People with Disabilities, a/k/a Disability Rights Advocates, a California non-profit benefit corporation (“DRA”) and Westchester Disabled on the Move, Inc., to, among other things, strengthen the County’s emergency preparedness programs and services and ensure compliance with the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12131 *et seq.*, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794; and respond to DRA’s allegations that the needs of persons with disabilities are not adequately addressed in the County’s emergency preparedness programs and services and avoid the need for litigation; in a form substantially similar to the one annexed hereto as Exhibit “1”; and, be it further

RESOLVED, that the term of the SNA will commence upon full execution by the parties and continue until a settlement agreement is executed or if any party to the SNA terminates on notice prior to execution of the settlement agreement; and, be it further

RESOLVED that the County shall pay for work performed by DRA on this matter prior to the date this Agreement is fully executed by all parties, regardless of whether a final settlement agreement on the merits is reached, an amount not to exceed \$50,000 dollars for attorneys’ fees and costs at the rates in effect at that time and set forth in Schedule “A” to the SNA, and starting from the effective date of the SNA until its termination, DRA shall not seek attorneys’ fees and costs in excess of \$15,000 per month (“the cap”) at the rates set forth in Schedule “A” to the SNA; and be it further

RESOLVED, that this Agreement is subject to County appropriations; and, be it further

RESOLVED, that this Agreement is also subject to further financial analysis of the impact of any New York State Budget (the “State Budget”) proposed and adopted during the term of this Agreement. The County shall retain the right, upon the occurrence of any release by the Governor of a proposed State Budget and/or the adoption of a State Budget or any amendments thereto, and for a reasonable period of time after such release(s) or adoption(s), to conduct an analysis of the impacts of any such State Budget on County finances. After such analysis, the County shall retain the right to either terminate this Agreement or to renegotiate the amounts and rates approved herein. If the County subsequently offers to pay a reduced amount to the Contractor, then the Contractor shall have the right to terminate this Agreement upon reasonable prior written notice; and, be it further

RESOLVED, that the County Executive or his authorized designee is hereby authorized to execute any documents and take any actions reasonably necessary and appropriate to effectuate the purposes of this Resolution.

Account to be
Charged/Credited

	Fund	Dept	Major Program, Program & Phase Or Unit	Object/ Sub- Object	Trust Account	Dollars
2016	101	20	1000	4380		\$92,500
2017	101	20	1000	4380		\$333,600

Budget Funding Year(s) 2016-2018 Start Date upon execution End Date: settlement agreement execution
(must match resolution)

Funding Source Tax Dollars \$426,100
State Aid _____
\$426,100 Federal Aid _____
(must match resolution) Other _____

APPROVED BOARD OF ACQUISITION & CONTRACT - 10/20/2016 - LIS/MA/PA/SECRETARY

EXHIBIT "1"

THIS STRUCTURED NEGOTIATIONS AGREEMENT made this _____ day of _____, 2016 by and between

THE COUNTY OF WESTCHESTER, a municipal corporation of the State of New York, having an office and place of business in the Michaelian Office Building, 148 Martine Avenue, White Plains, New York 10601 (hereinafter referred to as the "County")

and

DISABILITY RIGHTS ADVOCATES, A NATIONAL AND INTERNATIONAL CENTER FOR THE ADVANCEMENT OF PEOPLE WITH DISABILITIES, A/K/A DISABILITY RIGHTS ADVOCATES, A CALIFORNIA NON-PROFIT BENEFIT CORPORATION of the State of California having a place of business at 675 Third Avenue, Suite 2216 New York, NY 10017 (hereinafter referred to as the "Counsel")

and

WESTCHESTER DISABLED ON THE MOVE, INC. having a place of business at 984 North Broadway, Suite LL-10, Yonkers, NY 10701 (hereinafter referred to as "Westchester Disabled on the Move").

WHEREAS, by letter dated July 10, 2015, Counsel notified the County that based on Counsel's review of the County's emergency plans and associated annexes, that the County was not in compliance with the Americans with Disabilities Act; and

WHEREAS, Counsel's letter proposed to resolve these issues by signing a proposed structured negotiations agreement; and

WHEREAS, the County represents that it has conducted a number of activities to address the needs of people with disabilities, and in particular: the County represents it has, since 2014, undertaken a comprehensive review of all County emergency plans and related documents to identify areas for improvement as it relates to emergency preparedness for people with disabilities; and

WHEREAS, the County represents that it has, since January 2015, hosted over a dozen educational, training and inclusive exercise opportunities, including disability awareness training for local first responders, stakeholder workshops and tabletop and functional exercises; and

WHEREAS, the County represents that, in 2016, it purchased additional equipment and supplies to make available to support local sheltering efforts as it relates to people with disabilities; and

WHEREAS, the County represents that, in 2015, it established the Disabilities, Access and Functional Needs Emergency Preparedness Advisory Committee, a group composed of County agencies, local service providers, advocates and people with disabilities, which group has

been meeting regularly. The County further represents that a subcommittee has been created to review the County's "Special Needs Registry" which was established in 2008 and that the County intends to establish another subcommittee to focus on updating the County's Comprehensive Emergency Management Plan.

WHEREAS, members of the Law Department, with input from the County Executive's Office, the Departments of Emergency Services, Community Mental Health and the Office for People with Disabilities, have been meeting with Counsel to discuss a resolution of this matter and in the spirit of moving forward cooperatively desire to enter into this agreement.

NOW THEREFORE, in consideration of the mutual covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

SECTION I. PARTIES

The Parties to this Structured Negotiations Agreement ("Agreement") are (i) the County and (ii) Counsel, who represent Westchester Disabled on the Move, and (iii) Westchester Disabled on the Move.

SECTION II. PURPOSE

The purposes of this agreement are:

- A. To strengthen the County's emergency preparedness programs and services and ensure compliance with the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.*, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794;
- B. To provide a framework for the Parties to further develop emergency preparedness programs and services for the County that address the needs of persons with disabilities;
- C. To protect the interests of all Parties during the pendency of negotiations of disputed Claims, as defined below, concerning the alleged failure of the County to sufficiently address the needs of persons with disabilities in its emergency preparedness programs and services;
- D. To provide an alternative to litigation in the form of negotiations regarding the alleged failure of the County to sufficiently address the needs of persons with disabilities in its emergency preparedness programs and services as delineated in Section IV(A) of this Agreement;
- E. To negotiate a settlement to resolve the allegations regarding the County's alleged failure to sufficiently address the needs of persons with disabilities in its emergency preparedness programs and services as delineated in Section IV(A) of this Agreement without the need for litigation; and

- F. Neither the execution of this Agreement, nor anything contained herein, shall be construed as an admission of any liability whatsoever by the County.

SECTION III. TOLLING OF ALLEGED FEDERAL AND STATE CLAIMS

- A. The Parties recognize and agree that, as used in this Agreement, the term “Claim or Claims” includes any and all claims against the County, its elected and appointed officials, officers or employees, that could be brought before an administrative agency or in any legal forum having jurisdiction, alleging: (i) that persons with disabilities are being, have been, and continue to be discriminated against due to the alleged failure of the County to address the needs of persons with disabilities in its emergency preparedness programs and services; and/or (ii) that the County is in violation of any other federal or state law, rule, regulation or grant obligation in connection with or related to its emergency preparedness programs and services.
- B. To the extent that either Westchester Disabled on the Move, or Counsel on behalf of Westchester Disabled on the Move or any other third party, could assert a Claim or Claims, such Claim or Claims will be tolled beginning with the effective date of this Agreement and will remain tolled during negotiations and throughout the duration of this Agreement.
- C. The Parties agree that for the duration of this Agreement, Counsel and Westchester Disabled on the Move will refrain from filing a Claim or Claims against the County.
- D. This Agreement is not intended to revive and does not revive any Claim or Claims that would have been barred by the applicable statute of limitations prior to the effective date of this Agreement. Further, the purpose and effect of this Agreement is to stop the running of any applicable statute of limitations as of the effective date of this Agreement and to restart the running of that statute of limitations immediately upon the expiration of the Agreement. Upon the expiration of the Agreement, all applicable statutes of limitations shall resume running from the point that they were tolled. Specifically, the statutes are not reset by the execution of this Agreement.

SECTION IV. ACTIONS TO BE TAKEN PURSUANT TO THIS AGREEMENT

The Parties agree that, in order to avoid litigation, the following actions will be undertaken pursuant to this Agreement:

- A. Substantive Revisions to the County’s Emergency Preparedness Programs and Services.

With the assistance and guidance from the Subject Matter Expert (“SM Expert”), the County will:

1. Revise the County’s Comprehensive Emergency Management Plan (“CEMP”) to meet the needs of people with all types of disabilities, consistent with the role of County government in major emergency and disaster response.

2. Identify the needs of persons with disabilities prior to an emergency and the resources available to the County, (e.g. County-owned or contracted resources), that may be deployed to assist persons with disabilities during an evacuation.
3. Assess and improve the County facilitated public notification and communication for persons with disabilities.
4. Develop a Shelter-In-Place (SIP) guideline for persons with disabilities to be used by the County only in the event the County Executive, or his designee, issues a SIP emergency order pursuant to section 24 of the New York State Executive Law.
5. Develop policies and procedures for the County for coordinating the provision of assistance with shelter and care for individuals forced to evacuate their homes for persons with disabilities.
6. Develop an evacuation guideline to be used by the County in the event that the County Executive or his designee issues an evacuation emergency order pursuant to section 24 of the New York State Executive Law for persons with disabilities.
7. Develop policies and procedures for the County for coordinating the provision of disaster related temporary housing for persons with disabilities.
8. Develop a recovery and remediation guideline to be used by the County for facilitating recovery from a disaster for persons with disabilities.

B. Process for Substantive Revisions to the County's Emergency Preparedness Programs and Services.

The Parties agree to the following actions in order to complete the substantive revisions detailed in Section IV(A):

1. Hiring of Expert

- a. The County, in accordance with the County's procurement laws and policies, will prepare a Request for Proposal ("RFP") to retain a SM Expert, which proposal will be posted on the County's website. Counsel will provide the County with a list of firms it desires to notify about the RFP and the County will notify those firms when the RFP is released and available on the County's website for download. Counsel shall also assist the County in drafting the selection criteria that will be included in the RFP.
- b. The County shall issue a request for proposals (RFP) to hire such expert.
- c. Upon receipt of proposals, the County shall transmit a copy of each proposal received in response to the RFP to Counsel, Counsel will review the proposals and provide feedback to the County within two weeks of its receipt of the proposals.

d. The County shall then select and recommend to the County Board of Acquisition and Contract, in accordance with the County's procurement laws and policies, a contract to retain the selected SM Expert who shall have demonstrated expertise in federal and state disability rights laws as they relate to policies, procedures, and practices for persons with disabilities in the context of emergency preparedness. Upon receipt of such approval, the County shall enter into a contract to retain such SM Expert.

e. The County shall be responsible to pay the cost of the expert.

2. Interim Remedial Plan

a. Working with the SM Expert, the Parties shall agree on interim steps to take in order to address the most immediate needs of persons with disabilities in the County's emergency preparedness programs and services. Such interim steps must be capable of being implemented within one (1) year of the development of the Interim Remedial Plan. These immediate needs may or may not include the substantive revisions outlined in Section IV(A).

b. The SM Expert shall:

(i) Review and evaluate the County's current CEMP to determine what provisions require immediate revision within sixty (60) days of retention.

(ii) Develop the Interim Remedial Plan within ninety (90) days of retention and provide to County and Counsel.

(iii) Oversee complete implementation of the Interim Remedial Plan within three hundred (300) days of the County's receipt of the "Final" Interim Remedial Plan.

(iv) Monitor and report, to County and Counsel every ninety (90) days, on implementation of the Interim Remedial Plan for a period of three hundred and sixty five (365) days following the County's receipt of the "Final" Interim Remedial Plan.

3. Long-Term Remedial Work Plan

a. Following the development of the Interim Remedial Plan and while implementation and monitoring are ongoing, the SM Expert shall assess the efficacy of the County's current CEMP, through document review and review of industry practices and lessons learned for persons with disabilities. The SM Expert shall complete this assessment within one (1) year of retention.

b. Following the comprehensive assessment of the current CEMP, the Parties shall develop a mutually agreed upon long-term remedial work plan that set timelines for

achieving the agreed-upon substantive revisions listed in Section IV(A) above that were not already addressed in the Interim Remedial Plan.

C. It is acknowledged that the County has established the Westchester County Disabilities, Access and Functional Needs Emergency Preparedness Committee (“DAF/N Committee”) and the County shall work in close coordination with the DAF/N Committee to carry out the actions to be taken pursuant to this Agreement.

D. The Parties agree that for fields of emergency preparedness for which the County is not directly responsible, the SM Expert, shall make recommendations for or develop template policies and procedures to assist all entities with direct responsibility in those fields, including, but not limited to, cities, towns, villages, and the American Red Cross, to address the needs of persons with disabilities during emergencies.

E. The Parties shall, subject to necessary legal approval, enter into a settlement agreement. The settlement agreement shall, at a minimum:

1. Memorialize the County’s commitment to implement the substantive revisions detailed in IV(A) and the long-term remedial work plan detailed in Section IV(B) into its new and/or updated CEMP.
2. Set forth provisions for the monitoring and reporting on the incorporation and implementation of the remedial plans into the new and/or updated County emergency plans.
3. Set forth provisions for dispute resolution during the monitoring and reporting phases.

SECTION V. REASONABLE ATTORNEYS’ FEES AND COSTS

The Parties recognize that the execution of this Agreement is in lieu of filing a Claim or Claim(s). The County agrees to pay for work performed by Counsel on this matter prior to the date this Agreement is fully executed by all Parties, regardless of whether a final settlement agreement on the merits is reached, an amount not to exceed \$50,000 dollars for attorneys’ fees and costs at the rates in effect at that time and set forth in Schedule “A” which is attached hereto and made a part hereof.

Starting from the effective date of this Agreement until its termination, Counsel shall not seek attorneys’ fees and costs in excess of \$15,000 per month (“the cap”) at the rates set forth in Schedule “A”. In the event Counsel’s rates should change, Counsel shall notify the County in writing within thirty (30) days of any rate change.

In the event a settlement agreement is not reached pursuant to this Agreement, however, this cap shall be null and void and shall not apply to limit Counsel’s full recovery of all fees and costs incurred during the duration of this Agreement. All requests for attorneys’ fees and costs shall be supported by an itemization of what work was done and by whom, the date the work was done and the rate charged per person.

If any dispute or controversy arises with regard to the amount of fees and costs that the County and Counsel are unable to resolve themselves, the County and Counsel shall submit the dispute to Judicial Arbitration and Mediation Services (“JAMS”) for arbitration. The arbitrator shall be mutually agreed upon. If the County and Counsel cannot agree on an arbitrator, the County and Counsel will ask that one be randomly assigned by JAMS. The County and Counsel, shall each advance one half of the costs and expenses for the arbitration.

SECTION VI. DURATION OF AGREEMENT

This Agreement will terminate upon execution of the Settlement Agreement pursuant to Section IV(E).

Prior to the execution of the Settlement Agreement, any party to this Agreement may terminate this Agreement by giving written notice by certified mail to all other parties to this Agreement that this that the Agreement is no longer effective. The Agreement will remain in effect until two (2) weeks after any party gives such written notice to terminate the Agreement.

SECTION VII. FORCE MAJEURE

No Party shall be deemed in breach hereof if it is prevented from or materially delayed in performing any of the obligations hereunder by reason of acts of God, acts of the public enemy, strikes or labor disputes, floods, riots, rebellion, sabotage, or any other similar circumstances not within its reasonable control.

SECTION VIII. CONFIDENTIAL SETTLEMENT COMMUNICATION

The Parties agree that all information discussed or exchanged during the negotiations contemplated by this Agreement that is not generally available to the public, shall not be disclosed to any third parties, except as legally required or as otherwise agreed to by the Parties. The SM Expert will be advised of the provisions of this paragraph and will execute an agreement to maintain the confidentiality of such information. However, if the Parties are unable to reach agreement through the negotiation process outlined in Paragraph IV, then this Agreement and the SM Expert’s assessment and remedial plans will no longer be treated as confidential settlement communications and may be used in a court of law, subject to a protective order and/or redaction as appropriate.

SECTION IX. RULES OF CONSTRUCTION

Each Party has reviewed and participated in the drafting of this Agreement, and any rule of construction to the effect that ambiguities are construed against the drafting Party shall not apply in the interpretation or construction of this Agreement. Section titles used herein are intended for reference purposes only and are not to be construed as part of the Agreement.

SECTION X. NOTICES

All notices of any nature referred to in this Agreement shall be in writing and either sent by registered or certified mail postage pre-paid, or delivered by hand or overnight courier, or sent by facsimile (with acknowledgment received and a copy of the notice sent by registered or certified mail, postage pre-paid), as set forth below or to such other addresses as the respective parties hereto may designate in writing. Notice shall be effective on the date of receipt. Notices shall be sent to the following:

To the County:

Commissioner
Westchester County Department of Emergency Services
4 Dana Road
Valhalla, NY 10595
(914)231-1622 (fax)

with a copy to:

Westchester County Attorney
Michaelian Office Building, Room 600
148 Martine Avenue
White Plains, New York 10601
(914)995-5858 (fax)

To Counsel:

DISABILITY RIGHTS ADVOCATES
675 Third Avenue, Suite 2216
New York, NY 10017
212 644 8636 (fax)

SECTION XI. EFFECTIVE DATE

The effective date of this Agreement is the date of the last signature below.

IN WITNESS WHEREOF, The Parties have caused this Agreement to be executed on the day and year first above written.

DISABILITY RIGHTS ADVOCATES

By: Michele A. Caiola

**WESTCHESTER DISABLED ON THE MOVE,
INC.**

THE COUNTY OF WESTCHESTER

Approved by the Westchester County Board of Legislators at a meeting duly held on 17th day of October, 2016 by Act No. 2016-____.

Approved by the Board of Acquisition and Contract of the County of Westchester on the ____ day of October, 2016.

Approved as to form and manner of execution

County Attorney
County of Westchester

Date

**ACKNOWLEDGMENT
COUNSEL**

STATE OF _____)
) ss.:
COUNTY OF _____)

On the _____ day of _____ in the year 2016 before me, the undersigned, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity(ies) as _____, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

Date: _____

Notary Public

APPROVED BOARD OF ACQUISITION & CONTRACTING / 10/20/2016 - LISA MRIJAJ, SECRETARY

SCHEDULE "A"
RATES

Attorneys

Michelle Caiola,
Director of Litigation

2016 Rate

\$730

Mary-Lee Smith,
Interim Executive Director and
Director of Litigation

\$645

Rebecca Rodgers,
Staff Attorney

\$460

Other Professional Staff

Summer Associate/Externs

\$280

Paralegal

\$275

Law Clerks

\$230

Technical Support Specialist

\$260

APPROVED BOARD OF ACQUISITION & CONTRACT - 10/20/2016 - LISA MRIJAJ, SECRETARY