

61863

Date: March 1, 2018

To: Board of Acquisition and Contract

From: John M. Nonna
County Attorney

Re: Authority for the County of Westchester to enter into an agreement to retain, at County expense, the law firm of Pepper Hamilton, LLP, Attorneys at Law, to defend the County of Westchester against claims commenced against it and to prosecute appropriate cross-claims in the action entitled *Yonkers Contracting Company, Inc. v. The County of Westchester; Engineers Consortium LLP; Savin Engineers, P.S.; Stearns & Wheler, LLC; GHD Consulting Engineers, LLC; Malcolm Pirnie, Inc.; Arcadis U.S., Inc.; CDM Smith Inc., formerly known as Camp Dresser & McKee Inc., Black & Veatch New York LLP; and KJM Construction Management, Inc.* for a term commencing retroactive to January 11, 2018 and continuing through January 10, 2021 payable at approved hourly rates not-to-exceed the aggregate sum of \$150,000.00.

Authority is respectfully requested for the County of Westchester (the "County") to enter into an agreement (the "Agreement") to retain, at County expense, the law firm of Pepper Hamilton, LLP, Attorneys at Law (the "Firm"), to defend the County against claims commenced against it and to prosecute appropriate cross-claims in the action entitled *Yonkers Contracting Company, Inc. v. The County of Westchester; Engineers Consortium LLP; Savin Engineers, P.S.; Stearns & Wheler, LLC; GHD Consulting Engineers, LLC; Malcolm Pirnie, Inc.; Arcadis U.S., Inc.; CDM Smith Inc., formerly known as Camp Dresser & McKee Inc., Black & Veatch New York LLP; and KJM Construction Management, Inc.*, for a term commencing retroactive to January 11, 2018 and continuing through January 10, 2021. In consideration for services to be rendered, the County shall pay the Firm at the following rates: \$520.00 per hour for the services of Ira M. Schulman, Esq.; \$412.00 per hour for Vincent Torna, Esq.; \$312.00 per hour for Alex Corey, Esq., and \$150.00 per hour for paralegal Erin Tornabene; or personnel within the Firm with comparable experience and ability as those mentioned at the same rate of pay, for a total amount not to exceed \$150,000.00.

By way of background, on August 26, 2015, the Office of the County Attorney was served a Verified Complaint in the above-referenced matter. Since the commencement of this action, the parties have stipulated to multiple adjournments over the course of two years to explore the opportunity to resolve and settle plaintiff's claims. During this time, some of the co-defendants had filed motions to dismiss prior to the exchange of discovery among the parties.

Those motions have been denied and, at this point, the Court is requiring the parties to engage in expedited discovery in preparation for further dispositive motion practice and trial.

The claims against the County and its co-defendants allegedly stem from excessive delays in connection with two (2) separate contracts awarded to Yonkers Contracting Company, Inc. ("YCC") for the construction of the Composite Performance Implementation and Expansion at the New Rochelle Wastewater Treatment Plant, New Rochelle, New York (Contract No. 05-540 dated on or about March 18, 2010), and for the construction of the Biological Nutrient Removal Facilities at the New Rochelle Wastewater Treatment Plant, New Rochelle, Westchester County, New York (Contract No. 09-514 dated on or about June 9, 2011). In relation to these projects, the County also entered into a contract with Engineers Consortium LLP ("EC"), also a named co-defendant, as its prime engineering consultant. EC, in turn, entered into related agreements with the remaining named defendants as sub-engineering consultants.

YCC has commenced the current action seeking damages in the amount of \$15,760,000.00 under County contract 08-540, and \$22,000,000.00 under County contract 09-514, for a total claim of \$37,760,000.00, plus statutory interest from in or about May 2015.

Due to the complex and specialty nature of construction law, litigation, and the evaluation and analysis of damages related to such claims, I have determined that it is in the best interests of the County to retain separate, outside counsel to defend against these matters.

The County Board of Legislators authorized the proposed Agreement on February 26, 2018 by Act No. 2018-18.

This Agreement is exempt from application of the Westchester County Procurement Policy pursuant to section 3(a)xv thereof which exempts "contracts for the engagement of attorneys in civil litigation which are approved by an Act of the County Board in accordance with §297.31 of the laws of Westchester County."

The proposed Agreement will serve a public purpose by providing the County with the specialized knowledge and expertise necessary to defend the County in this litigation.

The goal and objective of the proposed Agreement is in the best interests of the County in terms of fiscal responsibility, as ensuring the County's proper handling of this lawsuit is expected to ultimately result in a cost savings to the County.

The goal and objective of the proposed Agreement will be tracked and monitored by the Office of the County Attorney.

I respectfully recommend the adoption of the attached Resolution.

JMN/jpg/nm

RESOLUTION

Upon a communication from the County Attorney, be it hereby:

RESOLVED, that the County of Westchester (the "County") is hereby authorized to enter into an agreement (the "Agreement") to retain, at County expense, the law firm of Pepper Hamilton, LLP, Attorneys at Law (the "Firm"), to defend the County against claims commenced against it and to prosecute appropriate cross-claims in the action entitled *Yonkers Contracting Company, Inc. v. The County of Westchester; Engineers Consortium LLP; Savin Engineers, P.S.; Stearns & Wheler, LLC; GHD Consulting Engineers, LLC; Malcolm Pirnie, Inc.; Arcadis U.S., Inc.; CDM Smith Inc., formerly known as Camp Dresser & McKee Inc., Black & Veatch New York LLP; and KJM Construction Management, Inc.*, and be it further

RESOLVED, that the Agreement will be for a term of three (3) years, commencing on retroactive to January 11, 2018 and continuing through January 10, 2021; and be it further

RESOLVED, that in consideration for services to be rendered, the County shall pay the Firm at the following rates: \$520.00 per hour for the services of Ira M. Schulman, Esq.; \$412.00 per hour for Vincent Torna, Esq.; \$312.00 per hour for Alex Corey, Esq., and \$150.00 per hour for paralegal Erin Tornabene; or personnel within the Firm with comparable experience and ability as those mentioned at the same rate of pay, for a total amount not to exceed \$150,000.00; 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 duly authorized designee is hereby authorized to execute and deliver any and all documents and to take all action necessary and appropriate to effectuate the purposes hereof.

Account to be
Charged/Credited

Fund	Dept	Major Program, Program & Phase Or Unit	Object/ Sub-Object	Trust Account	Dollars
221	60	0110:0110	4420		\$150,000.00

Budget Funding Year(s): 2018-19
(must match resolution)

Start Date: 01/11/2018 End Date: 01/10/2021

Funding Source

Tax Dollars: \$150,000.00

State Aid: _____

\$150,000.00

Federal Aid: _____

(must match resolution)

Other: _____

APPROVED BOARD OF ACQUISITION & CONTRACT - 03/29/2018 LISA MARIJA SECRETARY