

On Base 77384

TO: Honorable Board of Acquisition and Contract

FROM: Vincent F. Kopicki, P.E.
Commissioner of Environmental Facilities

DATE: June 12, 2020

SUBJECT: Authorization for the County of Westchester to enter into an Entry Permit with the MTA Bus Company for a term commencing on May 1, 2020 and terminating on December 31, 2020 for the County and certain Permitted Persons to access certain real property leased by the MTA Bus Company located at 59 Babcock Place, Yonkers, New York (SBL 2-2620-50 on the Official Tax Maps for the City of Yonkers) in order for the County to perform certain work on the property for the County project entitled, Tide Gate Replacements and Regulator Improvements, North Yonkers, Central Yonkers and South Yonkers Sanitary Sewer Districts, City of Yonkers, and reimburse the MTA, through Contract EF-1907, an amount not to exceed \$50,000.00 for certain costs and expenses reasonably incurred by the MTA in permitting access, and indemnify the MTA with regard to such access.

Attached for your consideration is a resolution, which, if approved by your Honorable Board, would authorize the County of Westchester (the "County"), acting by and through the Department of Environmental Facilities (the "Department"), to enter into an entry permit (the "Entry Permit") with the MTA Bus Company (the "MTA") for a term commencing on May 1, 2020 to terminating on December 31, 2020 granting to the County and its contractors, subcontractors (of any tier), agents, consultants and representatives, as well as County's employees, guests and invitees ("Permitted Persons"), access to certain real property leased by the MTA located at 50 Babcock Place, Yonkers New York (SBL 2-2620-50 on the Official Tax Maps for the City of Yonkers) (the "Property"), in order for the County and its Permitted Persons to perform certain work on the Property for the County project entitled, Tide Gate Replacements and Regulator Improvements, North Yonkers, Central Yonkers and South Yonkers Sanitary Sewer Districts, City of Yonkers (the "Project").

Authorization is also sought for the County to cause to be paid to the MTA an amount not to exceed \$50,000 to reimburse the MTA for certain costs and expenses reasonably incurred by the MTA in permitting access to and entry upon the Property and providing certain accommodation services, which, but for the County's Project, would not have been incurred by the MTA. Payment to MTA would be accomplished through Contract EF-1907, awarded to ELQ Industries, Inc. by your Honorable Board on September 5, 2019 in the amount of not to exceed \$4,000,000.00.

Authorization is also sought to indemnify the MTA with indemnification language similar to the following:

County shall, to the fullest extent permitted by law, indemnify, and hold harmless Permitter, MTA, and its subsidiaries and affiliates, the Manhattan and Bronx Surface Transit Operating Authority, the Staten Island Rapid Transit Operating Authority, MTA Capital Construction, MTA Bus Company, the City of New York (as each of their interests may appear), (collectively, "Indemnitees") from and against any and all third party (including, without limitation, employees, agents, representatives and consultants of Permitter or any other Indemnitee or of County or any County Contractor) liabilities, losses and/or damages (whether to persons, property or otherwise, including injuries and death), actions, claims, fines, judgments, penalties, demands, costs and expenses, including but not limited to reasonable attorneys' fees and disbursements (collectively, "Third Party Claims" and each a "Third Party Claim"), which any or all of the Indemnitees or any third party may suffer, sustain or be subjected to, in whole or in part, caused by (a) County's or any Permitted Persons' entry upon or use of the Permitted Area, (b) the activities or conduct, including the performance of the Work, at or about the Permitted Area by County or any of Permitted Persons, on, at or about the Permitted Area (whether on or off the Permitted Area, including on the County's Property where the Work is being performed) or (c) any breach or violation of any provision of the Entry Permit on the part of County to be observed or performed caused by the County or any Permitted Persons, except to the extent caused by the negligence or willful misconduct of Permitter, or as to an Indemnitee, the negligence or willful misconduct of such Indemnitee. A "Third Party Claim" shall include, but not be limited to, liability of Permitter or its affiliates for the payment of claims or judgments to an employee under the Workers Compensation Law of the State of New York or the Federal Employees Liability Act or similar statutes for the protection of employees or any other judgments whatsoever, as well as any claim that may be made against Permitter or any other Indemnitee by any employee of County or any County Contractor, and Permitter's obligation to indemnify hereunder for any such claim shall not be limited by any limitation on the amount or type of damages, compensation or benefits which would have been payable by County or any County Contractor in respect of such injury under worker's compensation acts, disability benefit acts or other employee benefit acts.

In addition, authorization is sought to further indemnify the MTA with language similar to the following:

If Hazardous Materials are used, stored, generated or disposed of on, in or about the Permitted Area, or if the Permitted Area or any other portion of the Permitter Property becomes contaminated in any manner by County or any Permitted Person (or by any action or inaction of County or any Permitted Person), then, to the fullest extent permitted by law, County shall indemnify, defend, and hold harmless the Indemnitees (as defined in Section 7.1 hereof) from and against any and all of the following, whether arising during or after the term of this Entry Permit caused by the use, storage, generation, or disposal of

on, in or about the Permitted Area (or anywhere else at the Permitter Property) of Hazardous Waste by County or any Permitted Person in connection with the Project:

- i. any and all claims, suits, actions, damages, fines, judgments, penalties, costs (including any and all reasonable experts', consultants' and attorneys' fees and disbursements), liabilities, or losses, whether foreseeable or unforeseeable (including, without limitation, a decrease in value of the Permitted Area or Permitter Property, damages because of adverse impact on marketing of any space, and any and all sums paid for settlement of claims); and
- ii. any and all actions, suits, orders, claims, liens, notices, investigations, proceedings, or complaints, whether administrative or judicial, that are brought, issued, asserted or alleged against Permitter or any Indemnitee:
 - a. by a federal, state or local governmental authority or by a private person or business entity for compliance, injunctive relief, damages (including but not limited to natural resource damages), penalties, removal costs, response costs, remedial costs, or other action in each case pursuant to any applicable Environmental Law; and/or
 - b. by a third party seeking damages and/or injunctive relief related to actual or alleged personal injury, medical monitoring, wrongful death, and/or property damage resulting from a release or threatened release of, or exposure to any Hazardous Materials.

The Project is necessary in order to comply with an Administrative Compliance Order (CWA-02-2019-3021) issued by the United States Environmental Protection Agency ("EPA"), which requires the repair and/or replacement of the tide gate located at Regulator 008 and all tide gates no later than December 31, 2020.

This Entry Permit is necessary to fulfill a public purpose as the Project promotes the public health and welfare by enabling the County to conduct its basic mission of providing proper sanitary sewage collection, thereby promoting public health policies and laws. The Project will be monitored by representatives of the Department of Environmental Facilities and Department of Public Works and Transportation to make sure all applicable regulations, safety precautions and codes regarding the protection of persons and property are adhered to and the terms of the Entry Permit are complied with.

Accordingly, approval of the attached resolution is respectfully requested.

VFK/RAN

RESOLUTION

Upon communication from the Commissioner of the Department of Environmental Facilities, be it hereby:

RESOLVED, that the County of Westchester (the “County”), acting by and through the Department of Environmental Facilities (the “Department”) is hereby authorized to enter into an entry permit (the “Entry Permit”) with the MTA Bus Company (the “MTA”) for a term commencing on May 1, 2020 to terminating on December 31, 2020 granting to the County and its contractors, subcontractors (of any tier), agents, consultants and representatives, as well as County’s employees, guests and invitees (“Permitted Persons”), access to certain real property leased by the MTA and located at 50 Babcock Place, Yonkers New York (SBL 2-2620-50 on the Official Tax Maps for the City of Yonkers) (the “Property”), in order for the County and its Permitted Persons to perform certain work required for the County project entitled, Tide Gate Replacements and Regulator Improvements, North Yonkers, Central Yonkers and South Yonkers Sanitary Sewer Districts, City of Yonkers (the “Project”); and be it further

RESOLVED, the County is authorized to cause to be paid to the MTA an amount not to exceed \$50,000 to reimburse the MTA for certain costs and expenses reasonably incurred by the MTA in permitting access to and entry upon the Property and providing certain accommodation services, which, but for the County’s Project, would not have been incurred by the MTA; and be it further

RESOLVED, the County is authorized to indemnify the MTA with language similar to the following:

County shall, to the fullest extent permitted by law, indemnify, and hold harmless Permitter, MTA, and its subsidiaries and affiliates, the Manhattan and Bronx Surface Transit Operating Authority, the Staten Island Rapid Transit Operating Authority, MTA Capital Construction, MTA Bus Company, the City of New York (as each of their interests may appear), (collectively, “Indemnitees”) from and against any and all third party (including, without limitation, employees, agents, representatives and consultants of Permitter or any other Indemnitee or of County or any County Contractor) liabilities, losses and/or damages (whether to persons, property or otherwise, including injuries and death), actions, claims, fines, judgments, penalties, demands, costs and expenses, including but not limited to reasonable attorneys’ fees and disbursements (collectively, “Third Party Claims” and each a “Third Party Claim”), which any or all of the Indemnitees or any third party may suffer, sustain or be subjected to, in whole or in part, caused by (a) County’s or any Permitted Persons’ entry upon or use of the Permitted Area, (b) the activities or conduct, including the performance of the Work, at or about the Permitted Area by County or any of Permitted Persons, on, at or about the Permitted Area (whether on or off the Permitted Area, including on the County’s Property where the Work is being performed) or (c) any breach or violation of any provision of the Entry Permit on the part of County to

be observed or performed caused by the County or any Permitted Persons, except to the extent caused by the negligence or willful misconduct of Permitter, or as to an Indemnitee, the negligence or willful misconduct of such Indemnitee. A "Third Party Claim" shall include, but not be limited to, liability of Permitter or its affiliates for the payment of claims or judgments to an employee under the Workers Compensation Law of the State of New York or the Federal Employees Liability Act or similar statutes for the protection of employees or any other judgments whatsoever, as well as any claim that may be made against Permitter or any other Indemnitee by any employee of County or any County Contractor, and Permitter's obligation to indemnify hereunder for any such claim shall not be limited by any limitation on the amount or type of damages, compensation or benefits which would have been payable by County or any County Contractor in respect of such injury under worker's compensation acts, disability benefit acts or other employee benefit acts; and be it further

RESOLVED, that the County is authorized to further indemnify the MTA with language similar to the following:

If Hazardous Materials are used, stored, generated or disposed of on, in or about the Permitted Area, or if the Permitted Area or any other portion of the Permitter Property becomes contaminated in any manner by County or any Permitted Person (or by any action or inaction of County or any Permitted Person), then, to the fullest extent permitted by law, County shall indemnify, defend, and hold harmless the Indemnitees (as defined in Section 7.1 hereof) from and against any and all of the following, whether arising during or after the term of this Entry Permit caused by the use, storage, generation, or disposal of on, in or about the Permitted Area (or anywhere else at the Permitter Property) of Hazardous Waste by County or any Permitted Person in connection with the Project:

- i. any and all claims, suits, actions, damages, fines, judgments, penalties, costs (including any and all reasonable experts', consultants' and attorneys' fees and disbursements), liabilities, or losses, whether foreseeable or unforeseeable (including, without limitation, a decrease in value of the Permitted Area or Permitter Property, damages because of adverse impact on marketing of any space, and any and all sums paid for settlement of claims); and
- ii. any and all actions, suits, orders, claims, liens, notices, investigations, proceedings, or complaints, whether administrative or judicial, that are brought, issued, asserted or alleged against Permitter or any Indemnitee:
 - a. by a federal, state or local governmental authority or by a private person or business entity for compliance, injunctive relief, damages (including but not limited to natural resource damages), penalties, removal costs, response costs, remedial costs, or other action in each case pursuant to any applicable Environmental Law; and/or
 - b. by a third party seeking damages and/or injunctive relief related to actual or alleged personal injury, medical monitoring, wrongful death, and/or property damage

resulting from a release or threatened release of, or exposure to any Hazardous Materials; and be it further

RESOLVED, that the County Executive or his duly authorized designee is hereby empowered to execute any and all instruments and take such other actions as may reasonably be necessary to effectuate the purposes thereof.

Account to be Charged/Credited

Year	Fund	Dept	Major Program, Program & Phase Or Unit	Object/ Sub-Object	Trust Account	Dollars
N/A						

Budget Funding Year(s) 2019 thru 2020 Start Date _____ Date _____
 (must match resolution)

Funding Source

N/A
 (must match resolution)

Tax Dollars _____

State Aid _____

Federal Aid _____

Other _____

APPROVED BOARD OF ACQUISITION & CONTRACTS 05/17/09/2020 - LISA MRIJAS, SECRETARY